INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statutory provision sustaining jurisdiction	2
State statute the validity of which is involved	2
Date of judgment and date of application for appeal	8
Substantiality of questions involved	9
Nature of case and rulings below	19
Cases sustaining jurisdiction	18
Appendix "A"—Opinion of the Supreme Court of Louisiana	20

Table of Cases Cited

Aspen Mining and Smelting Co. v. *Billings*, 150 U. S. 31	8, 18
Cedar Rapids Gas Light Co. v. *Cedar Rapids*, 223 U. S. 655	17
Chicago, Burlington & Quincy RR. Co. v. *People*, 200 U. S. 561	17, 19
Hamilton v. *Regents of University of California*, 293 U. S. 245	9
Kansas City Southern Railway Co. v. *Albers Commission Co.*, 223 U. S. 573	17
Myles Salt Co. v. *Iberia, etc., Drainage District*, 239 U. S. 478	11, 19
Senn v. *Tile Layers Union*, 301 U. S. 477	19
Southern Pacific Co. v. *Schuyler*, 227 U. S. 601	17
Truax v. *Corrigan*, 257 U. S. 312	17
Union Tool Co. v. *Wilson*, 259 U. S. 107	17, 19
West Chicago Street Railroad Co. v. *Illinois, ex rel. Chicago*, 201 U. S. 506	8
Wilson v. *Union Tool Co.*, 265 F. 669, 254 U. S. 624, 41 S. Ct. 14	17

Page

STATUTES AND AUTHORITIES CITED

Act of the Louisiana Legislature of 1908, No. 271 14
Act of the Louisiana Legislature of 1912, No. 159 14
Act of the Louisiana Legislature of 1934, No. 144 14
Act of the Louisiana Legislature of 1938, No. 385 2
Act of the Louisiana Legislature of 1940, No. 127 14
American Jurisprudence "Constitutional Law," Sec. 31, p. 635 10
Constitution of Louisiana of 1921:
Article III 14
Article X, Section 4 14
Article XII, Section 4 13
Article XIV:
Section 24 15
Section 26 14
Section 31.3 .... 2, 4, 6, 7, 9, 11, 14
Article XIX, Section 18 15
Article XXI, Section 1 9
Constitution of the United States, 14th Amendment 9, 16, 19
Cooley's "Constitutional Limitations," 8th Edition, Vol. 1, p. 81 10
Corpus Juris Secundum, "Constitutional Law," Volume 16, Section 7 10
United States Code, Title 28:
Section 344a 1
Section 350 8
Section 861a 2

SUPREME COURT, STATE OF LOUISIANA

OCTOBER TERM, 1947

No. 38833

ALLEN H. JOHNESS AND THEOPHILE O. HOTARD,
Appellants,

vs.

CITY OF NEW ORLEANS, ET AL.

STATEMENT IN SUPPORT OF JURISDICTION

The appellants, Theophile O. Hotard and Allen H. Johness, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represent:

A

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States is Section 344 (A) of Title 28 of the United States Code, reading, to the extent relevant here, as follows:

"Sec. 344 (a). Final judgment or decree in any suit in the highest court of a State in which a decision could be had . . . where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the

decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The remedy by writ of error under the foregoing section has been abolished and an appeal substituted in its place by Section 861 (a) of Title 28 of the United States Code.

B

The statute of the State of Louisiana, the validity of which has been sustained by a final decree of the Supreme Court of the State of Louisiana, the highest court of said State, as not having been adopted in violation of or repugnant to the Constitution and laws of the United States, is Act 385 of 1938, now Article XIV, Section 31.3 of the Constitution of 1921 of the State of Louisiana.

The aforementioned act was adopted as an amendment to the Constitution of the State of Louisiana in November, 1938. The pertinent provisions thereof are as follows:

Art. 14, Sec. 31.3: "The City of New Orleans, acting through the Public Belt Railroad Commission, shall have the power, in any manner it may determine, to acquire, construct, maintain and operate one or more railroad passenger stations, with all approaches thereto and appurtenances thereof. . . . The powers herein granted may be exercised anywhere in the Parish of Orleans or in any parish adjacent thereto. In connection with any project for building any such passenger station or stations, the City of New Orleans, through said Commission, shall have the power to do everything it deems necessary or desirable for the purpose of minimizing interference, caused by railroad traffic of any sort, with the use of streets, thoroughfares and roads, and with the proper development of the City of New Orleans, and for that purpose may include in the property acquired or constructed hereunder, or the right of use or

possession of which is acquired hereunder, any and all depots, freight terminals, classification yards, tracks and other railroad facilities; provided, however, that for the exclusive purpose of minimizing interference caused by railroad traffic of any sort with the use of streets, thoroughfares and roads, or with the proper development of the City of New Orleans, the power of expropriation shall not be exercised to acquire any existing freight depot, freight terminal, freight classification yard, track or other railroad facility. . . .

"The City of New Orleans, through the Public Belt Railroad Commission, shall have the power to make a loan or loans to any railroad company or railroad companies to be used by said railroad company or railroad companies for defraying the expenses of any improvement in the Parish of Orleans, or in any parish adjacent thereto, to any tracks, depots, freight terminals, classification yards or other facilities of such railroad company or railroad companies; provided, however, that no funds of the City of New Orleans or of said Commission shall be so loaned except funds obtained from the source enumerated in Subsection (B) hereof. The obligation of any railroad company or railroad companies to repay any such loan may be pledged under any mortgage referred to in said Subsection (B) hereof, and the interest paid on any such loan shall be deemed part of the revenues referred to in this Section 31.3.

(a) The City of New Orleans, through the Public Belt Railroad Commission, shall have the authority to enter into a contract or contracts, containing such terms, conditions, stipulations and provisions and for such duration, as may be approved by the vote of a majority of all the members of said Commission, with any railroad company or railroad companies entering or hereafter entering New

Orleans, for the use by such railroad company or railroad companies of said passenger station or stations, and the approaches thereto and appurtenances thereof, and/or of any tracks or other property, constructed pursuant to Section 31.3 hereof, or the ownership or right of use or possession of which is acquired or dedicated pursuant to Section 31.3 hereof, for or in connection with the transporting, conveying or other handling, under the motive power of such railroad company or railroad companies, of the locomotives, cars, trains and other equipment of such railroad . . . and passengers therein and freight and other contents thereof. Said passenger station or stations and all property and rights of use or possession of property acquired, constructed or dedicated pursuant to Section 31.3 hereof, shall be under the control and management of the Public Belt Railroad Commission, but any contract entered into pursuant to this Subsection (A) or resolution adopted by said Commission by vote of a majority of all the members thereof, may vest in a Committee or other body composed of representatives of any and all interested parties, including but not limited to representatives of any railroad company or railroad companies, constituted as provided in such contract or resolution, such powers as may be specified in such contract or resolution for supervising or controlling the acquisition, construction, maintenance and operation of said passenger station or stations, the approaches thereto and appurtenances thereof, and any tracks or other property referred to in Section 31.3 hereof. Any such contract may be made superior to the lien of any mortgage executed to secure any bond issued hereunder. Any right of use granted pursuant to this Subsection (A) to any railroad company or railroad companies by the City of New Orleans, through the Public Belt Railroad Commission, shall be exempt from every form of taxation.

". . . it is hereby declared to be the policy of this amendment that the railroad passenger station or stations or other railroad facilities acquired or constructed by the City of New Orleans pursuant hereto, shall not be operated at a profit to the City of New Orleans or the Public Belt Railroad Commission, it being understood that the City of New Orleans and the Public Belt Railroad Commission shall not be deprived of any element of cost paid by them or either of them with proper interest on all amounts expended or advanced, and it being understood, further, that after all costs with interest have been reimbursed (but in no event sooner than 1988), the City of New Orleans shall receive, in addition to all costs of maintenance and operation, a net rental in an amount equal to what the taxes would be on the stations or facilities furnished by it, based on their then fair value if the same were not tax exempt.

"(B) For the purpose of acquiring or constructing said railroad passenger station or stations . . . the City of New Orleans, through its Commission Council, is hereby granted power to issue by resolution, upon the recommendation of the Public Belt Railroad Commission, its bonds not to exceed Fifteen Million Dollars ($15,000,000.00) in aggregate principal amount, in such forms, numbers and amounts . . . and otherwise, as the City of New Orleans may deem advisable, subject to the following limitations and provisions:

"(a) All such bonds shall be secured solely and only by mortgage of such railroad passenger station or stations . . . and by pledge of the net revenues derived from the operation of such property and by pledge and assignment of any contract or contracts executed pursuant to Subsection (A) hereof, and shall be paid therefrom and not by any tax or assessment or levy upon any taxable property

in the City of New Orleans, nor out of any other funds, revenues or things of value of said City; . . .

"(b) . . . provided, however, that any real or personal property acquired pursuant to Section 31.3 hereof not needed for the construction or operation of any facility referred to in Section 31.3 hereof may, by the Commission Council of the City of New Orleans, be leased or sold or dedicated to public purposes of the City of New Orleans. The proceeds of any such lease or sale shall be applied to the payment of the obligations issued hereunder.

"(c) The bonds issued hereunder and the income therefrom shall be exempt from all taxation for state, parish, municipal or other local purposes.

"(e) The provisions hereof shall constitute a contract between the holders of any bonds issued hereunder and the State of Louisiana and City of New Orleans.

(D) Any project hereunder may include such provisions as may be agreed to by the City of New Orleans, through the Public Belt Railroad Commission, or determined by the City of New Orleans, through its Commission Council, for eliminating grade crossings of any tracks used or to be used for reaching the aforesaid passenger station or stations or any other railroad tracks. All or any part of the cost of eliminating grade crossings of any tracks, to the extent agreed to by the City of New Orleans, through the Public Belt Railroad Commission, or determined by the City of New Orleans, through its Commission Council, may be defrayed by the issue of bonds pursuant to Subsection (B) hereof; but the City of New Orleans is hereby empowered to contribute any funds towards such cost to such extent as its Commission Council may determine. . . .

"(E) The Public Belt Railroad System shall have no right except through contract, to use in its switching operations any track, depot, terminal, yard or other facility acquired or constructed, or the right to use which is acquired, pursuant to Section 31.3 hereof; provided, however, the Public Belt Railroad Commission shall not be deprived of any of its existing powers of authority by this provision. If the Public Belt Railroad System by contract uses in its switching operations any track or other facility hereinabove in this Subsection (E) referred to, the fair value of such use, as agreed to by the Public Belt Railroad Commission, shall be deemed part of the revenues referred to in Section 31.3 hereof, and may be made applicable to the payment of any bond issued hereunder, and pledged under any mortgage hereinabove referred to.

"(G) The City of New Orleans, through its Commission Council, is hereby vested with full power and authority to compel, if deemed by it necessary or desirable to promote the public safety or welfare, any railroad company . . . entering or hereafter entering the City of New Orleans to use any passenger station . . . and/or any other property referred to in Section 31.3 hereof, on such reasonable terms and conditions as said Commission Council may prescribe, and in that connection, to compel any such railroad company or railroad companies to relocate and re-arrange its or their tracks, yards and other facilities to such extent as may be necessary; it being the intent hereof to vest in the City of New Orleans, through its Commission Council, all power and authority in this regard which might be exercised by or under the authority of the State of Louisiana; . . .

"(H) Nothing herein contained shall be deemed to repeal, limit, modify or affect any police power or other power of the City of New Orleans, through its Commission Council, or the Public Belt Railroad Commission, or otherwise.

"(I) Any prohibition herein contained may at any time hereafter, by further amendment of this Constitution, be removed, modified or relaxed, except to the extent that such action shall impair any obligation under any bond theretofore issued pursuant hereto or under any contract theretofore entered into pursuant hereto.

"(J) This amendment shall be self-operative."

The foregoing sections, having been adopted as one amendment to the Constitution of the State of Louisiana are believed to have been adopted in contravention of the Fourteenth Amendment of the United States. In particular, Section One of said Amendment.

C

Date of Judgment and Date of Application for Appeal

The date of the final decree of the Supreme Court of Louisiana, which is now sought to be reviewed, was April 26, 1948. The time for taking the appeal began to run on the date of the denial of said motion for a rehearing, to wit, April 26, 1948. *Aspen Mining and Smelting Co.* v. *Billings*, 150 U. S. 31.

The date on which the application for appeal was presented and the appeal allowed was July 24, 1948.

Under the provisions of Section 350 of Title 28 of the United States Code, the appellants may bring their appeal within three months after the entry of the decree of the Supreme Court of the State of Louisiana.

". . . although the opinion of the state court does not expressly refer to the Constitution of the United States, . . . as the judgment, by its necessary operation, denied the company's claims based on the Constitution of the United States, this court has jurisdiction to inquire whether those claims are sustained by that instrument." *West Chicago Street Railroad Co.* v. *Illinois ex rel. Chicago*, 201 U. S. 506.

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In hearing and deciding the aforesaid appeal by the appellants from the ruling of the Civil District Court, the Supreme Court of the State of Louisiana was acting in a judicial capacity. Consequently the Supreme Court of the United States may review the decree of the Supreme Court of the State of Louisiana.

D

Substantiality of Questions Involved

The appellants respectfully represent that the questions involved in their appeal to the Supreme Court of the United States are of a substantial nature. It is well established that an appeal will not be dismissed for want of a substantial Federal question unless the contentions of the appellant are "clearly not debatable and utterly lacking in merit." *Hamilton* v. *Regents of University of California*, 293 U. S. 245, 258.

The issue raised by the appellants' contention that the Louisiana Constitutional Amendment in question violates the "due process of law clause" of the Fourteenth Amendment of the Constitution of the United States involves the question as to whether or not the people of a state in order to amend their constitution to accomplish a good purpose may be forced, in the same amendment, to surrender sovereign powers of government.

Article XXI, Section 1 of the Constitution of 1921 of the State of Louisiana provides for the method of adopting amendments to the Constitution. Among other requisites it provides as follows: ". . . When more than one amendment shall be submitted at the same election, they shall be so submitted as to enable the electors to vote on each amendment separately." Appellants contend that this section was violated in the submission of Article XIV, Section 31.3 to the voters and denied them their right to due process of law under the Federal Constitution.

The "one amendment clause" is inserted in our Constitution to protect the people from being forced to vote for something they disapprove in order to gain something which they do approve.

"The requirement, established in a number of states, that when more than one amendment is submitted to the electorate at the same election, such amendment must be so submitted as to enable the electors to vote on each separately, is one indication of a recognition of the seriousness of the matter of making changes in the fundamental law. The purpose of such a constitutional provision is to prevent voters from being required to vote for something which they disapprove in order to register approval of the other propositions tied up therewith." American Jurisprudence, Constitutional Law, Sec. 31, p. 635.

". . . By the constitution which they establish they not only tie up the hands of their official agencies, but their own hands as well; and neither the officers of the state, nor the whole people as an aggregate body, are at liberty to take action in opposition to this fundamental law." Cooley's Constitutional Limitations, 8th Edition, Vol. 1, p. 81.

". . . These provisions are as binding on the people as on the legislature, and the former are powerless by their vote of acceptance to give legal sanction to an amendment the submission of which was made in disregard of the limitations contained in the constitution." 16 C. J. S., Constitutional Law, Section 7.

We are not here attacking the "one amendment clause" of our Constitution, but we have attacked the manner in which it has been administered and justified by the Supreme Court of our State. "It is true the law of the State as written is not attacked, but the law as administered and justified by the Supreme Court of the State is attacked and it is asserted to be a violation of the Constitution of the

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United States. The question presented is Federal." *Myles Salt Co.* v. *Iberia, etc., Drainage District*, 239 U. S. 478, 484.

In November, 1938 the people of Louisiana voted on numerous Constitutional Amendments among them being the one at issue (now Article XIV, Section 31.3) which was designated on the ballot in the following manner:

> "For the proposed amendment to the Louisiana Constitution authorizing a union station or stations at New Orleans.
>
> "Against the proposed amendment to the Louisiana Constitution authorizing a union station or stations at New Orleans."

The amendment was adopted and the people did not realize that they had surrendered rights of sovereignty and Constitutional safeguards until nine years thereafter when the City of New Orleans and carriers operating therein agreed to enter into a contract. (New Orleans Union Passenger Terminal Agreement, appended to record.) The people then found that they had surrendered sovereign rights.

Among other things, Art. XIV, Sec. 31.3 provided for the following:

> 1. Authorized the City, acting through the Public Belt Railroad Commission, to construct, maintain and operate one or more railroad passenger stations in any manner it may determine. (Art. XIV, Sec. 31.3, first paragraph.)
>
> 2. Provided that for the exclusive purpose of minimizing interference caused by railroad traffic of any sort with the use of streets, thoroughfares and roads, or with the proper development of the City of New Orleans, the power of expropriation shall not be exercised to acquire any existing freight depot, freight terminal, freight classification yard, track or other railroad facility. (Sec. 31.3, first paragraph.)

3. Authorized city to dedicate streets or other property belonging to the city to the use of the project.

4. Authorized city to make a loan or loans to any railroad company to be used by said railroad companies for defraying the expenses of any improvement in the Parish of Orleans, or in any Parish adjacent thereto. (Sec. 31.3, Paragraph 4.)

5. Authorized the City to surrender such powers as may be specified in any contract for supervising or controlling the passenger station or stations, the approaches thereto and appurtenances thereof, and any tracks or other property referred to in Section 31.3 hereof. (Subsection A, paragraph 1.)

6. Exempted rights of use granted to railroad companies from taxation (Subsection (A), par. 1, last sentence).

7. Declared it to be the policy of the amendment that the City should not operate the terminal or its facilities at a profit to the City or the Public Belt Railroad Commission. (Subsection A, Par. 2.)

8. Provided that the city could not charge rent until all costs have been reimbursed (but in no event sooner than 1988), and that the rent would be an amount equal to what the taxes would be on the stations or facilities furnished by it based on their then value if the same were not tax exempt. (Subsection A, par. 2.)

9. Authorized city to issue its bonds not to exceed Fifteen Million Dollars in aggregate principal amount for the purpose of complying with any contract which may be entered into pursuant to Subsection (A). (Subsection B, par. 1.)

10. Provided that any property acquired by the city pursuant to Section 31.3 hereof and not required for the terminal could be sold or leased by the City but the proceeds of any such lease or sale would be applied to the payment of the obligations issued hereunder. (Paragraph B, Subsection B.)

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11. Exempted bonds issued hereunder and the income therefrom from all taxation for state, parish, municipal or other purpose. (Subsection B, paragraph (e).)

12. Provided that the provisions hereof should constitute a contract between the holders of any bonds issued hereunder and the State of Louisiana and the City of New Orleans. (Subsection B, paragraph (e).)

13. Provided that any project issued hereunder may include provision for eliminating grade crossings of any tracks used or to be used for reaching the aforesaid passenger station or stations or any other railroad tracks. And that the City of New Orleans may contribute any funds to such cost as its commission council may determine. (Subsection D.)

14. Provided that the Public Belt Railroad System would have no right, except by contract, to use the terminal, yard or other facilities in its switching operations. If it does use the facilities, the fair value of such use may be made applicable to the payment of any bond issued hereunder. (Paragraph E.)

These provisions coupled with the unlimited discretion placed in the hands of the New Orleans Public Belt Railroad Commission and the City of New Orleans presented more than but one amendment to the people of Louisiana.

(a) Article XII, Sec. 4 of the State Constitution provides that ". . . The funds, credit, property or things of value of the State, or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person or persons, associations or corporations, public or private . . ." Despite this Article of our Constitution, the Amendment in question pledged the credit of the City and the State. (See 12, *supra.*)

And it amended this same Article by authorizing the City to loan its money to the private carriers. (See 4, *supra.*)

(b) The amendment violates Article XIV, Section 26 of the Constitution which provides that ". . . The control, operation, management and development of the Public Belt Railroad System shall be exclusively vested in said commission, which shall always be separate and distinct from that of any railroad . . ." Under Section (A) of Article XIV, Section 31.3, the Public Belt Railroad has been authorized to irrevocably surrender its rights to the control and management of the carrier controlled committee.

(c) The amendment amends Article X, Section 4 of the Constitution which specifically states just what property may be exempted from taxation. Yet Art. XIV, Sec. 31.3 exempts from taxation rights of use granted to carriers, and exempts from taxation the bonds and the income therefrom. (*Supra*, 6 and 12.)

(d) The amendment has been construed to have authorized the City to consider as abrogated Act 271 of 1908 (requiring that mechanics employed on all state or public buildings and work shall be citizens of Louisiana), and its amending Act, No. 144 of 1934; Sections 58 and 60 of Act 159 of 1912, (providing that contracts of more than $200 shall be executed in the name of the City and that all contracts of more than $500 involving either work or material on public buildings or property shall be given to the lowest bidder) and the later act, No. 127 of 1940. (Majority opinion of the Court, Record, Page 75-76.) (Contract, Sec. 85.) This amends Article III of the Constitution of Louisiana which vests the power to enact, amend and repeal laws in a Legislature.

(e) The City, using the Amendment as authority, has contracted away its police power, surrending it to the carrier controlled Committee for fifty years with the carriers having the right to extend its terms for an added fifty years.

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(Contract, Section 5, pages 23-28, and Sections 78 and 79, page 168.)

(f) The City has further bound itself to close numerous crossings at grade and to keep them closed to the public unless underpasses or overpasses are provided. (Contract, Section 12, A and B.)

(g) Article XIV, Section 24 of the Constitution provides that the city "shall not . . . pledge its credit or anticipate the collection of any of its taxes . . . nor shall said City make any contract or incur any debt or obligation for any purpose whatsoever unless sufficient funds not otherwise appropriated to pay and discharge same are actually in the treasury of said City at the time of making the contract or incurring the debt or obligation and are specifically set aside and dedicated to said purpose . . ." Yet in Section 7 of article 2 of the contract the City states that it shall be its policy to annually appropriate $500,000.00 to complete its obligations thereunder.

(h) Article XIX, Sec. 18 of the Constitution of Louisiana states that "The exercise of the police power of the State shall never be abridged." And through its charter, Act 159 of 1912, the City has been granted the right to ". . . exercise full police power in connection with any function of municipal government within the territorial limits of said City . . ."

E

Theophile O. Hotard and Allen H. Johness, citizens and taxpayers of the City of New Orleans and the State of Louisiana, brought suit in the Civil District Court for the Parish of Orleans on October 21, 1947 attacking the method of the adoption of the amendment in question and the contract entered into between the City of New Orleans and various carriers pursuant to said amendment. In their

petition they alleged that the amendment was submitted to the voters for adoption in violation of the Federal Constitution. The question was presented to the court in Article IV of plaintiffs' original petition (Record, Page 2), and in Article XVI of the petition. (Record, Page 4.)

After hearing the evidence, the lower court rendered judgment in favor of appellees and against appellants.

Thereupon the appellants appealed from the judgment of the Civil District Court of the Supreme Court of the State of Louisiana. The entire record was brought up from the lower court and the appellants seasonably argued that the submission of the amendment to the voters violated Section One of the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court of the State of Louisiana affirmed the judgment of the lower court and, on April 26, 1948 said Court denied appellants' motion for a rehearing.

The Court held that the submission of the amendment to the voters was proper and in accordance with law. It did not discuss the Fourteenth Amendment of the Constitution of the United States nor the serious and fundamental principles of law involved. As Mr. Justice Fournet points out in his dissenting opinion: "These very serious and extremely important issues (as well as the innumerable ramifications into which they subdivide) were disposed of in a most summary manner in the majority opinion, without any discussion of the singularly fundamental legal principles underlying them or of the applicable constitutional provisions and jurisprudence, exhaustively treated in the numerous briefs of the appellants." (Record, Page 79-80).

The constitutionality of the submission of the amendment in question could not have been determined without considering the "due process of law clause" of the Fourteenth Amendment of the Constitution of the United States. The mere fact that a state court feels that a federal right

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set up in said court has no basis in point of fact does not prevent the Supreme Court from going behind the finding to see whether it is without substantial support. If the rule were otherwise it would almost always be within the power of the state court to prevent a review in the Supreme Court. *Truax* v. *Corrigan*, 257 U. S. 312, 324, citing *Kansas City Southern Railway Company* v. *Albers Commission Co.*, 223 U. S. 573, 591, 593; *Cedar Rapids Gas Light Co.* v. *Cedar Rapids*, 223 U. S. 655, 668, 669; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 611. The legal discretion vested in a lower court does not extend to a refusal by it to apply well settled principles of law to a conceded state of facts. *Union Tool Co.* v. *Wilson*, 259 U. S. 107, affirming, C. C. A., *Wilson* v. *Union Tool Co.* 265 F. 669, certiorari granted 41 S. Ct. 14, 254 U. S. 624. "... Therefore a failure to recognize such Federal right or immunity, and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied . . . it may not be ignored, and this court cannot refuse to determine whether the alleged Federal right exists and is protected by the Constitution of the United States..." *Chicago, Burlington & Quincy Railroad Co.* v. *People*, 200 U. S. 561.

Despite this authority the City has bound itself to pay 85% of future grade separations for as long as 20 years after completion date. (Contract, Section 12, C).

From all of the above it is to be noted that the people of Louisiana in voting upon the amendment in question did much more than authorize the construction of a Union Terminal at New Orleans. By enacting the amendment they have authorized the surrender of inherent powers of sovereignty, they have changed the effect of many articles of their Constitution and they have stricken with nullity statutes of the Legislature enacted for the protection of the public interest.

The appeal upon the above grounds presents questions, the determination of which is important to the people of every state in the nation. The Supreme Court of the United States has never directly passed upon the issue here presented. The question is whether or not the people, in order to amend their Constitution, may be forced to accept in one amendment not only the authority to accomplish a purpose which they earnestly desire, but to also surrender inherent powers of sovereignty. A decision by the Supreme Court of the United States in this cause will remove this grave uncertainty by deciding to what extent the "Due process clause" of the Fourteenth Amendment of the Constitution of the United States protects the people of the states when they are called upon to amend their Constitutions.

Carriers by rail are the most important means of transportation in the country. Their rights, duties and responsibilities are important, not only to the community involved in this litigation, but to the citizens of communities throughout the nation wherein are located the various rail centers. The program here undertaken is the first of its kind in the history of American railroads. In the future expansion and development of our nation questions here involved must of a necessity arise again.

F

Cases Sustaining the Jurisdiction

The following cases sustain the jurisdiction of the Supreme Court of the United States:

1. Timeliness of Appeal. *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31.

2. State court cannot defeat the jurisdiction of the Supreme Court where a Federal right is involved by failing to

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pass upon it in its opinion. *Chicago, Burlington & Quincy Railroad Co.* v. *People*, 200 U. S. 561.

3. Lower court cannot refuse to apply well settled principles of law to a conceded state of facts. *Union Tool Co.* v. *Wilson*, 259 U. S. 107.

4. Where the law's administration is attacked and justified, and a Federal right is asserted, the question is Federal. *Myles Salt Co.* v. *Iberia, etc., Drainage District*, 239 U. S. 478, 484.

5. Jurisdiction to entertain an appeal from the decision of a State court on the ground that a State statute violates the "due process clause" of the Fourteenth Amendment. *Senn* v. *Tile Layers Union*, 301 U. S. 477.

Therefore the appellants, Theophile O. Hotard and Allen H. Johness, respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 344(a), Title 28 of the United States Code.

Respectfully submitted,

LESTER P. SCHOENE,
ROBERT J. LACEY, JR.,
Counsel for Theo. O. Hotard and
Allen H. Johness, Appellants.

APPENDIX

SUPREME COURT OF LOUISIANA

No. 38,817, No. 38,833, No. 38,888, No. 38,896

THEOPHILE O. HOTARD and ALLEN H. JOHNESS

v.

CITY OF NEW ORLEANS, et al., AUGUST B. SCHMIDT, Police Jury for the Parish of Jefferson, et al., *Intervenors*

Appeal from the Civil District Court for the Parish of Orleans. Harold A. Moise, Judge

O'NIELL, *C. J.*:

Two taxpayers residing in New Orleans brought this suit against the city and certain railroad companies to have the court declare invalid a constitutional amendment (which was proposed by Act 385 of 1938 and which became Section 31.3 of Article 14 of the Constitution), authorizing the city, acting through the Public Belt Railroad Commission, to construct, maintain and operate one or more railroad passenger stations in New Orleans and as an incident there to eliminate certain grade crossings. The plaintiffs sued also to annul a contract made by the city with the defendant railroad companies under authority of the constitutional amendment, and to prevent by injunction the carrying out of the contract. Several other taxpayers and the Police Jury of Jefferson Parish intervened in the suit taking the side of the plaintiffs. The district judge after hearing the case gave judgment for the defendants rejecting the demands of the plaintiffs and interveners and dismissing the suit. The plaintiffs and some of the interveners have appealed from the decision.

The argument for the appellants resolves itself into two main divisions: (1) an attack upon the validity of the constitutional amendment, and (2) an attack upon certain provisions of the contract itself.

The first complaint concerning the validity of the constitutional amendment is that it really consists of several

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amendments and therefore should have been so submitted as to enable the electors to vote on each amendment separately, as provided in Section 1 of Article 21 of the Constitution. In support of this complaint the appellants cite and rely upon Graham *v.* Jones, 198 La. 507, 3 So. 2d 761.

The constitutional amendment in question is really only one amendment, authorizing the city to establish and maintain one or more railroad passenger stations, and, as an incident thereto, to eliminate certain grade crossings of tracks entering the station or stations. This new section—31.3 of Article 14—is necessarily a long section because it embodies all of the details concerning the authority which was conferred upon the City. It covers nearly five pages of the Constitution; but all of its provisions relate to the one purpose of authorizing the city, acting through the Public Belt Railroad Commission, to construct, maintain and operate one or more passenger stations, and, as an incident thereto, to eliminate grade crossings. The provisions of the amendment are so interrelated that it would not have been feasible to submit each one of them to the voters as a separate and independent amendment of the Constitution. If they had been so submitted, and if the voters had voted for some of the propositions and against others, the purpose of the amendment might have been defeated. In fact, a careful reading of the amendment reveals that it would have been practically if not actually impossible for the voters to vote upon the adoption or rejection of each provision separately. All that the Constitution—Section 1 of Article 21—required in that respect is that when more than one amendment shall be submitted at the same election they shall be so submitted as to enable the electors to vote on each amendment separately. That provision was complied with literally in this instance, in Act 385 of 1938, proposing the amendment, which provided in Section 3 that on the official ballot to be used at the election there should be printed:

"FOR the proposed amendment to the Louisiana Constitution authorizing a union station or stations at New Orleans".

and also

"AGAINST the proposed amendment to the Louisiana Constitution authorizing a union station or stations at New Orleans".

In the same section it was provided that each elector voting on the provision for so amending the Constitution should indicate his vote in the manner provided by the general election laws of the state. In compliance with the statute, the two paragraphs were printed separately on each ballot—thus:

"For the proposed amendment to the Louisiana Constitution authorizing a union station or stations at New Orleans.

"Against the proposed amendment to the Louisiana Constitution authorizing a union station or stations at New Orleans".

Opposite each of these paragraphs was the white square, for each voter to indicate his vote, by stamping the ballot in the manner provided by the general election laws of the state.

The decision in Graham *v.* Jones is not at all appropriate to the complaint made in this case. In the case cited it was found by a majority of the members of the court that the constitutional amendment really consisted of several separate and distinct amendments of several sections of the Constitution. That is not true in this case because all of the provisions of the one amendment in this case relate to the main purpose of establishing and maintaining and operating one or more railroad passenger stations, with all approaches thereto and appurtenances thereof. As we have pointed out it would have been impractical if not impossible to submit the several provisions of this amendment so that the voters could vote intelligently and effectually upon each provision separately.

The second ground of attack upon the validity of the constitutional amendment is that the voters were not properly notified or informed of the contents or provisions of the amendment. All that the Constitution—Section 1 of Article 21—requires in that respect is that the Secretary of State shall cause the proposed amendment to be published in a newspaper in each parish in which a newspaper is published, twice within not less than 30 days nor more than 60 days preceding the election at which the amendment is to be submitted to the voters. It is admitted that the Secretary of State did cause this amendment to be pub-

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lished in full in one newspaper in every parish in the state, twice within not less than 30 nor more than 60 days preceding the election at which the amendment was voted upon. It appears in some of the briefs for the appellants—and was revealed in their oral argument—that they have confused the manner of submitting constitutional amendments on the printed ballots with the manner in which notice shall be given by publication in the newspapers. The publication in the newspapers gives the voters full information as to the contents or provisions of a proposed constitutional amendment. All that is required to be printed on the ballot is sufficient information to identify the proposed amendment which the voter is voting for or against. In this case it is not contended that the wording of the submission was not sufficient to identify the amendment which the voters were called upon to vote for or against. There is therefore no merit in the argument that the voters were misled or were not sufficiently informed of the contents or provisions of the proposed amendment. The case of Schultz *v.* Police Jury of Tangipahoa Parish, 196 La. 359, 199 So. 215, cited by the appellants, is not at all appropriate to this case. In the Schultz Case a constitutional amendment, Section 33 of Article 14, authorized the police juries throughout the state to issue bonds to provide funds for the construction and maintenance of industrial plants for the conversion or processing of raw farm or agricultural products, when authorized by a majority vote of the property taxpayers of the parish, or of any police jury ward. The police jury of the Parish of Tangipahoa adopted a resolution submitting a proposition to the vote of the property taxpayers, intending that the industrial plant should be used only for the conversion or processing of milk, but there was no indication in the resolution as published, as to what kind of farm or agricultural products were to be processed. It was held therefore that the resolution, as published, did not give the taxpayers sufficient information as to the proposition on which they were called upon to vote. There is no comparison between that case and this case.

The appellants' first attack upon the legality of the contract is upon the following portion of Paragraph L of Section 7 of Article 11: "The City hereby further agrees that

. . . it shall be the policy of the City to budget and appropriate annually out of its general revenues derived from various sources for general municipal purposes . . . the sum of Five Hundred Thousand Dollars . . . per year . . . to be . . . used . . . for the same purpose for which the proceeds of the bonds referred to in this paragraph are to be . . . dedicated . . ." It is contended that this provision of the contract violates Section 24 of Article XIV of the Louisiana Constitution, which forbids the City of New Orleans to anticipate the collection of any of its taxes, or to incur any debt or obligation unless sufficient funds (not otherwise appropriated) to pay such debt are actually in the city treasury at the time when the debt is incurred. The appellees apparently concede that this provision would be illegal if it, in fact, expresses an obligation on the part of the city to make the annual appropriation referred to. The city's position is that the provision is merely a declaration of the city's intention as to the course of action which it will pursue in the future, but which declaration is in no way binding upon the city. We agree with the contention of the appellees, for two reasons. It is a familiar rule of law that if one of two reasonable constructions of a contract provision will render it valid and the other will render it invalid, the first will be adopted or approved by the court. Sporl *v.* New York Indemnity Co., 176 La. 363, 145 So. 771. Moreover, there is in the record a stipulation by the attorneys representing all parties to the contract to the effect that the construction contended for by the defendants is that which was intended by the parties. In the absence of any showing to the contrary, we assume that the parties to the contract authorized their attorneys to make that stipulation. Hays *v.* Cuny, 9 Mart. (O. S.) 87; Dangerfield's Executrix *v.* Thurston's Heirs, 8 Mart. (N.S.) 232. The appellants refer to the use of the word "policy" in the constitutional amendment in that they contend is a different sense from that in which the appellees contend it is used in the contract itself. The meaning of the word in the constitutional amendment does not control its meaning in the contract. "The same words may have different meanings in different parts of the same act, and of course words may be used in a statute in a different sense

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from that in which they are used in the Constitution." Lamar *v.* United States, 240 U. S. 60, 65, 36 S. Ct. 255, 60 L. Ed. 526. Besides, if the intention of the parties to the contract has been to bind the city absolutely to appropriate the $500,000 annually the obligation would have been expressed more directly and positively than by saying that it would be the policy of the city to make the appropriations.

The appellants attack also that portion of the contract provision stating the policy of the city to appropriate $500,000 annually which provides that the money so appropriated shall be "used . . . for the same purpose for which the proceeds of the bonds (the $12,000,000 bond issue for grade separations) . . . are to be . . . dedicated, *as well as for the payment of the cost of the other obligations and undertakings assumed by the City in this agreement.*" The appellants argue that the italicized clause indicates that the city intends to spend or is empowered to spend the appropriated money for illegal purposes. There is no reason to assume that the city will not act according to law in that respect.

The appellants attack also certain provisions of the contract which create what they call a "dump fund," which is "to be dedicated and exclusively used for the payment and discharge of the obligations assumed by the City under this agreement." As in the case of the clause discussed in the preceding paragraphs, to hold invalid the provisions creating the so-called "dump fund," this court would have to assume that the parties intend to use this fund for an illegal purpose. There is no reason for any such presumption.

The appellants attack the provision in the contract for submission to arbitration disagreements among the parties to the contract. The appellants contend that Article 459 and 460 of The Code of Practice strike this provision with nullity. We can find nothing in the articles cited which would render invalid the provision in question. The appellants seem to think that if the parties intend to empower the arbitrator to act as an amicable compounder they must so state their intention in so many words. There is no such requirement in Article 460 of the Code of Practice. A municipality has the right to submit disputes to arbitration in the absence of any law to the contrary. Dillon on Muni-

cipal Corporations, Section 822; McQuillin on Municipal Corporations, Section 2646. The appellants cite no law which would limit the power of the City of New Orleans to agree to submit disputes to arbitration.

The appellants assail the legality of Section 85 of the contract, which reads, in part, as follows: "The City hereby determines, pursuant to the power conferred on it under the first paragraph of Section 31.3 of Article XIV of the Constitution of the State of Louisiana . . . and the parties hereto hereby agree that . . . the acquisition, construction, maintenance and operation of the Union Passenger Terminal shall not be governed or controlled by any otherwise applicable provisions of Louisiana Act 271 of 1908, Sections 58 and 60 of Louisiana Act 159 of 1912, Louisiana Act 144 of 1934, Louisiana Act 127 of 1940, Louisiana Act 171 of 1940, and any and all acts amendatory thereof and shall be conducted and accomplished without reference thereto." The appellants contend that this provision is in contravention of Article 11 and 12 of the Revised Civil Code. The appellees, on the other hand, rely on the opening words of the constitutional amendment which authorized the construction of the terminal as authorizing the city to stipulate that the statutes named shall not govern the construction of the terminal. These words read as follows: ". . . the City of New Orleans . . . shall have the power, in any manner it may determine, to acquire, construct, maintain and operate one or more railroad passenger stations . . ." Our opinion is that this general phrase, coupled with the authorization contained in sub-section A for the city to enter into contracts relating to the construction of the terminal, empowers the city to stipulate for the non-applicability of the statutes referred to. In this connection we must bear in mind that the constitutional amendment authorizes the city "to enter into a contract or contracts, containing such terms, conditions, stipulations and provisions * * * as may be approved by the vote of a majority of all the members of said Commission * * *."

The appellants complain of the contract provisions which apportion the cost of the grade separation program between the city and the railroads. It is provided that the city shall pay 85 percent of this cost and that the railroads shall pay

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15 percent. The constitutional amendment gives the city the absolute power to contribute to the cost of the grade separations any amount that the Commission Council may determine. The appellants cite the provision of the charter of the city which empowers the city to require any railroad to contribute 65 percent of the cost of any grade separation. In answer to this argument, it need only be pointed out that this provision *empowers* the city so to act, but does not command it so to act. Appellants further argue that this provision must be set aside as an unconscionable or iniquitous abuse of discretion or authority on the part of the city. Examination of the authorities cited by both sides on this point leads us to the conclusion that the weight of authority is to the effect that the act of a municipality, although it be duly authorized, can be set aside by the judiciary, but that this will be done only if the act is such a manifest and oppressive abuse of authority that it appears that the municipality has entirely ignored the interest of the people whom it represents. McQuillin on Municipal Corporations, Section 378; Lachey *v.* Fayetteville, 80 Ark. 108, 96 S. W. 622; Rosenthal *v.* Goldsboro, 149 N. Car. 128, 62 S. E. 905. The mere fact that the act might have been executed in a manner more advantageous to the public interest is immaterial. New Orleans *v.* Warner, 175 U. S. 120, 20 S. Ct. 44, 44 L. Ed. 96; Campbell *v.* City of New York, 244 N. Y. 317, 155 N. E. 628.

The appellants complain of the contract provision which vests in a committee, the majority of the members of which represent the railroads, certain powers relative to the construction of the terminal. The constitutional amendment specifically provides that the city may "vest in a Committee or other body composed of representatives of any and all interested parties, including but not limited to representatives of any railroad or railroad company, . . . such powers as may be specified in such contract or resolution for supervising or controlling the acquisition, construction, maintenance and operation of said passenger station or stations." The action complained of, therefore, has been specifically approved and authorized in advance by the people themselves. The appellants argue vigorously that the city has delegated a part of its police power to this commit-

tee. That, if true, is authorized by the constitutional amendment,—the supreme power in the state. The powers delegated are "powers . . . for supervising or controlling the acquisition, construction, maintenance and operation of said passenger station or stations."

The appellants attack also the provisions of the contract (1) which make payable out of the revenues from the terminal the $15,000,000 of bonds which the city undertakes to issue; (2) which exempt the terminal and the railroads' use thereof from taxation; (3) which postpone the obligation of the railroad to pay rent for the use of the terminal until the $15,000,000 bond issue has matured; and (4) which fix the final maturity date for the $15,000,000 bond issue as January 1, 1998. A sufficient answer to these complaints, is that these provisions are all specifically authorized by the constitutional amendment; hence it is beyond the power of the court to question their legality.

The judgment is affirmed.

SUPREME COURT OF LOUISIANA

Nos. 38,817, 38,833, 38,888 and 38,896

THEOPHILE O. HOTARD AND ALLEN H. JOHNESS

v.

CITY OF NEW ORLEANS, et al., AUGUST B. SCHMIDT, Police Jury for the Parish of Jefferson, et al., *Intervenors*

FOURNET, Justice, dissenting.

The City of New Orleans, availing itself of the provisions of the amendment to Article XIV of the Constitution of Louisiana (Section 31.3) adopted pursuant to Act 385 of 1938 and acting through the Public Belt Railroad Commission, entered into a contract on October 22, 1947, with the various railroads servicing New Orleans for the construction, use, and maintenance of a union station, its connecting tracks, crossings, yards, freight terminals, and other appurtenances.

The validity of this contract was challenged by two citizens and taxpayers of the city (one, Mr. Theophile O. Hotard, being the city's Commissioner of Public Property),

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a number of other citizens and taxpayers, as well as the Police Jury of Jefferson Parish, intervening, adopting substantially the same position taken by the plaintiffs.

The challenges which these parties have levelled at the contract's validity may be divided broadly into an attack on (1) the constitutionality of Act 385 of 1938, which authorized the submission of this amendment to the people for ratification, and (2) the legality of the contract itself.

The constitutionality of the amendment is questioned on the ground (1) that it was improperly placed before the voters by the inclusion in a single proposal purporting to be nothing more than an approval of the construction of a Union Passenger Terminal at New Orleans of so many other propositions that should have been submitted separately that the voters were misled as to just what they were authorizing by their ratification; (2) it repeals several sections of the constitution by implication; and (3) it authorizes the city to surrender its right of eminent domain to a non-governmental agency.

The grounds that allegedly vitiate the contract itself are that (1) the Public Belt Railroad Commission's authority to administer the terminal facilities has been divested and transferred and delegated to a committee composed of 6 representatives of the city and 1 representation for each railroad that may use the facilities (at the present time there are 10 such railroads, but the contract is so worded that these railroads may actually be given additional voting power and the present voting ratio of 6 to 10 in favor of the railroads greatly increased after the station is ready for use), and this committee, with the larger delegation from the railroads, is authorized "to take any action which it may deem necessary" with respect to the supervision and control of the acquisition, construction, maintenance, operation, and use of this terminal, including the right to employ or dismiss any and all employees and to fix wages, the Public Belt Railroad Commission being prohibited from interfering in any way; (2) the city has surrendered its police power to this committee; (3) the city is obligated to appropriate $500,000 annually for the maintenance of the terminal facilities out of its general revenue, in contravention of Section 24 of Article XIV of the constitution; (4)

the city has by contract dispensed with the applicability of certain acts of the legislature, in violation of Article III of the constitution that vests the right to enact, amend, and repeal laws in the legislature, and of Article VII, wherein the judiciary is vested with the right to determine the applicability of laws; (5) the retirement of the bonds to be issued for the financing of this project has been agreed upon in a manner that contravenes Section 14 of Article XIV of the constitution and of Act 46 of the Extra Session of 1921; and (6) the city illegally imposed upon the taxpayers the obligation of defraying 85% of the cost of constructing under and overpasses in connection with street and railroad crossings (leaving a mere 15% to be contributed by the railroads), in violation of the provisions of the city charter requiring that such apportionment be on a basis of 65% to the railroads and 35% to the city, in contravention of the public policy of the state requiring the railroads to bear the larger portion of the expense incidental to crossing facilities (the Louisiana Public Service Commission can compel the railroads to pay the entire cost of constructing and maintaining suitable crossings), and in disregard of the jurisprudence of the Supreme Court to the effect that the division of such costs must bear some reasonable relation to the benefits to be received.

These very serious and extremely important issues (as well as the innumerable ramifications into which they subdivide) were disposed of in a most summary manner in the majority opinion, without any discussion of the singularly fundamental legal principles underlying them or of the applicable constitutional provisions and jurisprudence, exhaustively treated in the numerous briefs of the appellants.

There can be no question but that the manner in which this amendment was placed before the voters of the state for ratification was in clear violation of Section 1 of Article XXI of the constitution in the light of the holding of this court in the case of *Graham* v. *Jones,* 198 La. 507, 3 So. 2d 761. In that case the court very aptly pointed out:

> "According to Section 1 of article 21 of the Constitution, five elements are indispensable to give validity to a proposed constitutional amendment. They are: The

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assent of two-thirds of the Legislature, the submission of only one amendment in each proposal, the designation by the Legislature of the date of the election at which the submission shall take place, the publication of the proposed amendment, and a majority of the popular vote. Each of these essentials is as important as the other. In the absence of any one of these, the proposed amendment is without legal effect."

Quoting with approval and at length of the case of *Kerby* v. *Kuhrs*, 44 Ariz. 208, 38 P. 2d 549, 94 A. L. R. 1502, where the rule is laid down that is to be applied in determining whether one or more constitutional amendments are covered by a proposal, this court in the Graham case held, as set out in the syllabus, that:

"If propositions in proposed amendment to Constitution cover matters necessary to be dealt with in some manner, in order that Constitution, as amended, shall constitute a consistent and workable whole on general topic embraced in part which is amended, and if, logically, propositions should stand or fall as a whole, then but one amendment is submitted, but, if any proposition, although not directly contradicting others, does not refer to such matters, or *if proposition is not such that voter supporting it would reasonably be expected to support principle of others, then two or more amendments are submitted and proposed amendment falls within constitutional prohibition against submitting more than one amendment in the same proposal without affording voters opportunity to vote on each amendment separately.*" (Italics mine.)

When the constitutional amendment proposed by Act 385 of 1938 was submitted to the people for ratification, they were simply informed on the ballot that they were either voting for or against "the proposed amendment to the Louisiana Constitution authorizing a Union Station or Stations at *New Orleans*," whereas, in truth and in fact, under the provisions of this amendment the city was vested with the discretion of locating and establishing these facilities in either New Orleans or in any or all of the adjoining

parishes of Jefferson, St. Bernard, Plaquemine and St. Tammany. In addition, in this single proposal the voters were authorizing the city (1) to lay tracks, construct under and overpasses, acquire switch engines and other railroad equipment, maintain yards and freight terminals, and all necessary appurtenances; (2) to extend the city's power of expropriation into surrounding parishes and there acquire land and property for the construction of the station itself or of the approaches to the station; (3) to vest in a committee composed largely of private individuals whose first allegiance is not to the city and its people but to the private carrier corporations they represent the right to police these properties not only in the city but also in these adjacent parishes where facilities in connection with the terminal may be located; (4) to lend the money of the taxpayers of New Orleans to railroad corporations to be used by them in defraying the portion of the expense connected with the improvement of these facilities that is to be borne by them; (5) to use the facilities for freight as well as passenger traffic; (6) to exempt railroads from taxation; (7) to float a $15,000,000 bond issue for the purpose of raising the city's share of the cost of constructing the project; (8) to bind the state as well as the city on the obligation of these bonds; and (9) to contribute any amount it might see fit toward the cost of constructing, as well as maintaining, the facilities. (Italics mine).

The inclusion of these numerous provisions (and their ramifications) in one proposal under the guise of authorizing the city to build a passenger terminal within its limits was, to say the least, most confusing to the voters if, indeed, it can even be conceded they knew of the contents of the provisions of the amendment and their import. It certainly couples in one single proposal numerous propositions that, if submitted separately, the voters might have desired to vote against. This lumping together compelled the voters to choose the vicious propositions along with the meritious one of permitting the city to build a terminal station, giving them no opportunity to discriminate between the numerous provisions and express their will as to any they might find undesirable.

To illustrate, I do not believe and I cannot assume that

the people of New Orleans would have voted for this proposition if they had known or understood it was well within the discretion being vested in the New Orleans Commission Council to have the terminal constructed in the Parish of Jefferson, or that the people of Jefferson Parish would have voted for the proposal if they had understood that their property might be expropriated without the consent of their Police Jury, in contravention of the present policy of this state in such matters, and resulting in the removal from the parish's power to tax of the expropriated property, thus shifting the tax burden upon the remaining property by increasing it proportionately. Further, it is impossible for me to conceive of the voters of the state approving the building of this terminal in New Orleans if they knew or understood the obligations being incurred thereunder were to be backed by the full faith and credit of the entire state; nor can I, by any stretch of the imagination, allow myself to believe the people of the city and the state generally would have voted for this amendment had they known or understood they were thereby authorizing the city (as will hereafter be more clearly demonstrated) to completely surrender its police power and to bargain away its governmental functions to private individuals who are not even residents of the state.

As a matter, of fact, the majority opinion recognizes the fact that numerous of these proposals might not have met with the approval of the majority of the voters and that in order to secure their passage it was necessary to lump them together in a single proposition that could not help but meet with public approval, for in the opinion it is said: "The provisions of the amendment are so inter-related that it would not have been feasible to submit each one of them to the voters as a separate and independent amendment to the Constitution. *If they had been so submitted, and if the voters had voted for some of The Propositions and Against Others, The Purpose of the Amendment Might have been defeated.*" (Italics mine.)

I am of the further opinion that this amendment is unconstitutional because Section 31.3 of Article XIV amends other articles and sections of the constitution by implications, thereby doing indirectly what it has been specifically

declared cannot be done directly in the case of Graham v. Jones, supra.

It is to be noted that Section 12 of Article IV of the constitution declares that "*The funds, credit, property or things of value of the State, or of any political corporation thereof, shall not be loaned, pledged* or granted to or for any person or persons, associations or *corporations, public or private* • • •." Nevertheless, without referring to this constitutional provision, the city is authorized in Section 31.3 of Article XIV to pledge not only the credit of the city on the bonded obligation to be floated by it for the construction of a terminal that is to be turned over to a committee dominated by private corporations and that is to be used exclusively by private transporation corporations, but the credit of the state as well. The city is further authorized to lend the money collected from its taxpayers to these railroads, to be used by them in defraying their share of the costs, in further contravention of this specific constitutional prohibition. (Italics mine.)

Further, this amendment violates Section 26 of Article XIV of the constitution, wherein the exclusive control, operation, management, and development of the Public Belt Railroad is vested in the Public Belt Railroad Commission, which must always be kept separate and distinct from any railroad, and which no railroad can be given the right or privilege of controlling, for although we find in subsection (a) of the amendment that this passenger terminal "and all property and rights of use or possession of property acquired, constructed or dedicated pursuant to Section 31.3 shall be under the control and management of the Public Belt Railroad Commission, "and in subsection (H) that "Nothing herein contained shall be deemed to repeal, limit, modify or affect any police power or other power of the City of New Orleans, through its Commission Council, or the Public Belt Railroad Commission, or otherwise," in subsection (a) which gives the Public Belt Railroad Commission control of these facilities, this commission is permitted, by contract, or the Commission Council by resolution, to delegate to a committee composed of representatives of any and all interested parties, "including • • • representatives of any railroad company or rail-

road companies," the power of "supervising or controlling the acquisition, construction, maintenance and operation of said passenger station or stations, the approaches thereto and appurtenances thereof, and any tracts or other property * * *." As actually constituted under the present contract, this committeee consists of 6 representatives of the city and its taxpayers and 10 representatives of the railroads, thus giving the railroads the edge in all controversial decisions from the sheer weight of their larger number (which voting power can be greatly increased in favor of the railroads) and clearly referring to this constitutional provision, the city is authorized in Section 31.3 of Article XIV to pledge not only the credit of the city on the bonded obligation to be floated by it for the construction of a terminal that is to be turned over to a committee dominated by private corporations and that is to be used exclusively by private transportation corporations, but the credit of the state as well. The city is further authorized to lend the money collected from its taxpayers to these railroads, to be used by them in defraying their share of the costs, in further contravention of this specific constitutional prohibition. (Italics mine.)

Further, this amendment violates Section 26 of Article XIV of the constitution, wherein the exclusive control, operation, management, and development of the Public Belt Railroad is vested in the Public Belt Railroad Commission, which must always be kept separate and distinct from any railroad, and which no railroad can be given the right or privilege of controlling, for although we find in subsection (a) of the amendment that this passenger terminal "and all property and rights of use or possession of property acquired, constructed or dedicated pursuant to Section 31.3 shall be under the control and management of the Public Belt Railroad Commission," and in subsection (H) that "Nothing herein contained shall be deemed to repeal, limit, modify or affect any police power or other power of the City of New Orleans, through its Commission Council, or the Public Belt Railroad Commission, or otherwise," in subsection (a) which gives the Public Belt Railroad Commission control of these facilities, this commission is permitted, by contract, or the Commission Council by resolution, to

delegate to a committee composed of representatives of any and all interested parties, "including * * * representatives of any railroad company or railroad companies," the power of "supervising or controlling the acquisition, construction, maintenance and operation of said passenger station or stations, the approaches thereto and appurtenances thereof, and any tracts or other property * * *." As actually constituted under the present contract, this committee consists of 6 representatives of the city and its taxpayers and 10 representatives of the railroads, thus giving the railroads the edge in all controversial decisions from the sheer weight of their larger number (which voting power can be greatly increased in favor of the railroads) and clearly demonstrating that the city has no possible hope of ever putting across any policy or program with respect to these facilities that is found to be inimicable to the interest of these private corporations who will use them exclusively, for the city is irrevocably bound not to change the committee as it is constituted in the contract. In addition to all of this, in Section 5 of the contract the city has agreed that the members of the committee may be represented and vote by proxy, making it entirely possible that this committee will eventually be controlled by persons who have never been, never expect to be, and never intend to be residents of either New Orleans or Louisiana; consquently, having no interest in the welfare of our citizens but only in the private corporations whom they serve.

Aside from the flagrant manner in which these provisions of our basic law have been flaunted in the adoption of this amendment, I find from a study and analysis of the contract itself that its stipulations not only violate specific mandates of the very amendment that authorizes it but completely ignore, contract away, or otherwise violate several other parts of the constitution and various acts of the legislature.

As pointed out above, in subsection (H) of the amendment, it is provided that "Nothing herein contained shall be deemed to repeal, limit, modify or affect any police power or other power of the City of New Orleans, through its Commission Council, or the Public Belt Railroad Commission, or otherwise," yet we find the city in this contract (I)

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surrendering to a non-governmental agency that is not responsible to the public its police power that "Neither legislature nor people may bargain away * * * by contract or otherwise" (State ex rel. Porterie *v.* Walmsley, 183 La. 139, 162 So. 826, See, also, Shreveport Traction Company *v.* City of Shreveport, 122 La. 1, 47 So. 40; State *v.* City of New Orleans, 151 La. 24, 91 So. 533): (2) vesting in this non-governmental committee authority to expropriate property deemed necessary for the rights-of-way for the approaches to this terminal or of the terminal itself not only in New Orleans but also in adjacent parishes, a function that is truly a sacred governmental prerogative since "The right or power of eminent domain * * * is an inherent and essential power of sovereignty, and inheres in every independent state, and it is inalienable and cannot be surrendered" (Black, Constitution Law, Section 180, Page 455); (3) granting this committee the right to expropriate and remove from taxation not only the property that is to be used in constructing the new terminal, but also the property upon which the railroad facilities now in the city are constructed and upon which the railroads are paying taxes, thus permitting the railroads, in effect, to exempt themselves from taxation; and (4) finally, throwing to the winds its inherent power of removal that is so inseparable a part of the power of appointment when the tenure of an office is not prescribed by law, for the city has not retained to itself the right to change either the membership of this committee or its voting rights. And in delegating these very vital functions of government to a non-governmental committee dominated by private corporations, the city has not retained a single vestige of supervision or control over its actions and this committee, in whatever it does, is neither answerable to the government nor to the people.

In addition to all of this, it is provided in Section 85 of the contract that insofar as the acquisition, construction, maintenance, and operation of this terminal is concerned, Act 271 of 1908 (requiring that mechanics employed on all state or public buildings and work shall be citizens of Louisiana), and its amending act, No. 144 of 1934; Sections 58 and 60 of Act 159 of 1912, (providing that contracts of more than $200 shall be executed in the name of the City

and that all contracts of more than $500 involving either work or material on public buildings or property shall be given to the lowest bidder) and the later act, No. 127 of 1940; shall not be applicable or controlling and shall be considered as abrogated. In this same Section 85 of Act 171 of 1940, setting up Civil Service in cities of more than 100,000, is suspended insofar as these public facilities are concerned, with the result that in view of the fact the committee has exclusive right to hire, fire, and fix wages for the employees in the terminal, none of these employees can receive the benefit of civil service and it is entirely possible these employees will be sent into this state from other sections of the country by these railroads. The city has thus contracted away what is the legislature's exclusive constitutional province of passing, amending, and repealing acts (Article III), as well as the authority vested in the courts under Article VII of the constitution of interpreting the laws of the state and determining their applicability. By this stipulation of the contract the city and these railroads have also abrogated the provisions of Article 11 of the Revised Civil Code providing that "Individuals can not by their conventions, derogate from the force of laws made for the preservation of public order or good morals," and of Article 12, which provides that "Whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed."

The result of this action is that although this terminal station is to be a public building, constructed with public funds, it is to be run by private corporations, and the employees who are to maintain and construct it are not public employees and are not given the advantages and privileges that are accorded public employees.

I think, too, that the provisions of this contract further violate the policy of this state as enunciated in Section 14 of Article XIV of the Constitution and in Act 46 of the Extra-Session of the Legislature for the year 1921 and that all bonds issued in the state shall become due and payable in *annual* installments beginning not more than *three* years after the date of their issuance, and that the amounts to be paid annually toward their retirement is to be fixed in such a manner that when the annual interest is added to the princi-

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pal amount to be paid the total amount retired each year will be as nearly equal as practicable, for in Section 7-A of the contract it is provided that the $15,000,000 bond issue is to mature from January 1, 1953 (more than three years after their issuance in 1948) through January 1, 1989, but that no bonds shall mature from 1989 until 1998, with the result that for this period of ten years, and until the $100,000 bonds mature in 1998, no bonds will be retired. Inasmuch as the rental the railroads are supposed to pay for the use of these terminal facilities that the city is to build and maintain at the cost of the taxpayers up until the last maturity is an amount equal to the principal and interest on the bonds, and the rental to be paid after the last maturity date is an amount equal to the ad valorem taxes on these facilities if they were not tax exempt, it is obvious in this arbitrary extension of the last maturity date was incorporated in the contract for the ostensible purpose of allowing the railroads to rent these facilities during this ten year period for the nominal amount of interest payments due on $100,000 bonds. This provision likewise has the further effect of granting a tax exempt status to the carriers for an additional 9 years.

Finally, in Section 24 of Article XIV of the constitution, it is provided that the city "shall not • • • pledge its credit or anticipate the collection of any of its taxes • • • nor shall said City make any contract or incur any debt or obligation for any purpose whatsoever *unless sufficient funds not otherwise appropriated to pay and discharge same are actually in the treasury of said City at the time of making the contract or incurring the debt or obligation and are specifically set aside and dedicated to said purpose* • • •". In Section 7 of Article 2 of the contract, the city has absolutely and irrevocably bound itself for a period of 100 years (50 years under the contract with the railroads, the latter being given the option of renewing the rental thereof for an additional 50 years although no such option is given the city), to appropriate from the general funds of the city $500,000 annually, all in addition to the money raised by the bond issue, and this amount is "to be dedicated and solely and exclusively used, to the extent necessary, for the same purpose for which the proceeds of the

bonds referred to in this paragraph are to be segregated (i. e., for the purpose of carrying out and paying the city's portion of the cost of the elimination of grade crossings under the agreement), * * * *as well as for the payment of the cost of the other obligations and undertakings assumed by the City in this agreement.*" This is unquestionably in direct contravention of the constitutional prohibition above quoted, as well as in contravention of the provisions of Section 31.3 of Article XIV of the constitution authorizing the contract itself. (Italics mine.)

In an amendment that purported to authorize the City of New Orleans to issue bonds to cover its portion of the cost of a terminal consolidation and grade separation program, it is impossible to assume the people intended (and they should not have been compelled) to authorize the city to set up a plan whereby it would finance the obligation of the carriers in the same project, infringe on the rights of adjacent parishes, embark upon a vast tax exemption scheme for the benefit of the carriers, forever surrender their right of eminent domain with regard to railroad properties not made a part of the terminal program as well as those that are made a part of it. The position I take is that it was unconstitutional to force the voters to grant these vital prerogatives to the city (all of which are in derogation of positive law) to the city under the guise of approving the establishment of a union terminal station in New Orleans.

It is also my belief that the contract itself is not only unconstitutional and invalid for the many reasons above pointed out, but for the further reason that it was entered into with no regard to the general financial picture of the city government. Under its provisions as they now stand, the entire tax structure of the city will, in all probability, be damaged, so crippling and hamstringing the city from a financial standpoint that it will be impossible for any additional public improvements to be undertaken in New Orleans for the next hundred years. It will also render the $15,000,000 bond issue of such uncertain value as to make it difficult if not impossible to dispose of the bonds, as well as necessitate the imposition of additional taxes.

The ramification of this contract are such that the city has practically agreed to bankrupt itself for generations to

come for the sole purpose of establishing a union terminal in New Orleans that will facilitate and further the business of private corporations. Such a course not only is not authorized by the adoption of Section 31.3 of Article XIV of the constitution, but the action the city has taken under this authorization constituted a gross abuse of the discretion that was vested in it of consolidating the carrier lines feeding the city "in any manner it may determine".

For these reasons, I dissent.

SUPREME COURT OF LOUISIANA

No. 38,817, No. 38,833, No. 38,888, No. 38,896

THEOPHILE O. HOTARD and ALLEN H. JOHNESS

v.

CITY OF NEW ORLEANS et al., AUGUST B. SCHMIDT, Police Jury for the Parish of Jefferson, et al., *Intervenors*

Appeal from the Civil District Court for the Parish of Orleans. Harold A. Moise, Judge

PONDER, J. (Dissenting)

I cannot agree with the conclusion reached in the majority opinion that no obligation is expressed in the contract on the part of the city to make an annual appropriation of $500,000.00 from year to year to be used for the same purpose for which the proceeds of the bonds are dedicated. Only an excerpt from the provisions relating to this matter in the contract is quoted in the majority opinion. If the excerpt were all that was contained in the contract, the statement in the majority opinion, that the provisions in the contract are merely declarations of the city's intention of the course of action which it will pursue in the future, might be well founded. However, when the entire provisions relating to this subject matter are considered, it is apparent that they express an obligation on the part of the city to make the annual appropriations and provide for the enforcement of such obligation. A mere reading of the entire provisions,

revelant thereto demonstrate these facts. The pertinent provisions reads as follows:

"The City hereby further agrees that, in addition to the segregation, deposit and dedication of the proceeds of the aforesaid bonds, and commencing with the annual budget of the City for the year 1948, and continuing for as many years as may be necessary to complete the obligations of the City hereunder, it shall be the policy of the City to budget and appropriate annually out of its general revenues derived from various sources for general municipal purposes, other than the taxes for the payment of the principal and interest of the bonds of the City now outstanding or hereafter to be issued pursuant to Act 4 of 1916, or which are otherwise dedicated by law to special purposes, the sum of Five Hundred Thousand Dollars ($500,000) per year, which said annual sum so budgeted and appropriated shall likewise be segregated and deposited not later than the next succeeding July first of each year in the aforesaid special depository account or accounts, and which said annual sums so budgeted, appropriated and deposited as aforesaid are to be dedicated and solely and exclusively used, to the extent necessary, for the same purpose for which the proceeds of the bonds referred to in this paragraph are to be segregated, deposited and dedicated, as aforesaid, as well as for the payment of the cost of the other obligations and undertakings assumed by the City in this agreement.

"The City hereby further agrees that it shall be the mandatory duty of the official or officials of the City charged with the duty of collecting the proceeds of the aforesaid bonds when sold, as well as collecting the revenues of said City from which the aforesaid annual appropriations so budgeted are to be derived promptly to segregate and deposit the proceeds of said bonds and of said annual appropriations in the manner and by the time stated as hereinabove set forth."

"The City hereby further agrees that it shall likewise be the mandatory duty of the aforesaid official or officials of the City to provide for the furnishing of

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adequate security for the funds so deposited as aforesaid."

"The City hereby further agrees that the performance by the aforesaid official or officials of the City of the duties imposed upon him or them, in the manner and by the time stated as aforesaid, is hereby declared to be an essential part of the obligations agreed to by the City in this agreement and said performance may be enforced by any party to this agreement, or by the Trustee referred to in this agreement, by appropriate proceedings in any court of competent jurisdiction."

"The City hereby further agrees that all funds deposited in the aforesaid depository account or accounts are to be held inviolate by it, and are to be expended only upon vouchers or checks drawn against the said funds by the Commissioner of Public Finance, or his successor in office, upon the approval of the Commission Council, or its successor as the governing body of the City of New Orleans. Any unused funds in such depository account or accounts from the aforesaid annual appropriations shall, upon the completion of the City's obligations and undertakings under this agreement, be thereupon released and returned to the General Fund of the said City."

It is stated in the majority opinion that the appellees apparently concede that the provisions would be illegal if they express an obligation on the part of the city to make the annual appropriations. I am of the opinion that these provisions of the contract violate Section 24 of Article XIV of our Constitution, which forbids the city from anticipating the collection of any of its taxes or incurring any debt or obligation unless sufficient funds, not otherwise appropriated, to pay the debt or obligation are actually in the treasury at the time the debt is incurred. This illegal portion of the contract would vitiate it because we have no authority to rewrite the contract.

For the reasons assigned, I respectfully dissent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 259

THEOPHILE O. HOTARD AND ALLEN H. JOHNESS,
Appellants,

vs.

CITY OF NEW ORLEANS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

STATEMENT OPPOSING JURISDICTION, MOTION TO DISMISS OR AFFIRM AND MOTION FOR DAMAGES.

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INDEX

Subject Index

	Page
Motion to dismiss or affirm	1, 2
Statement of grounds as to appellants' failure to comply with the rules of the Supreme Court of the United States in attempting to take their appeal	3
The absence of jurisdictional statement	3
The failure as to citation	5
Record affirmatively shows no federal question of substantial character and no proper presentation of any federal question	5
Essentials of jurisdictional showing	5
Analysis of opinions of Louisiana Supreme Court	6
Initial pleading of plaintiff	9
Issues of State constitutional law present no federal question	10
Motion for damages upon dismissal or affirmance	11
Appropriate damages should be awarded against appellants	12

Table of Cases Cited

Amory v. *Amory*, 91 U. S. 356	12
Deming v. *Carlisle Packing Co.*, 226 U. S. 102	13, 15
Gibbs v *Diekma*, 131 U. S. clxxxvi	12
Graham v. *Jones*, 198 La. 507, 3 So. (2d) 761	8
Hotard, et al. v. *City of New Orleans, et al.*, 35 So. (2d) 752	6
Kemmler, In re, 136 U. S. 436	10
Memphis & Charleston Ry. Co. v. *Pace*, 282 U. S. 241	11
Rescue Army v. *Municipal Court*, 331 U. S. 543	6
Roe v. *Kansas*, 278 U. S. 191	14
Ross v. *Oregon*, 227 U. S. 150	10
Slaker v. *O'Connor*, 278 U. S. 188	14
Utley v. *St. Petersburg*, 292 U. S. 106	11
Wagner Electric Mfg. Co. v. *Lyndon*, 262 U. S. 226	14
Whitney v. *Cook*, 131 U. S. excvii	13

Statutes Cited

	Page
Article 385 of the Louisiana Legislature of 1938	6
Constitution of Louisiana:	
Article XIV, Section 24	8
Article XIV, Section 31.3	7, 8
Article XXI, Sec. 1	8
Rules of the Supreme Court of the United States:	
Rule 10, Sec. 1	2
Rule 12:	
Sec. 1	3
Sec. 2	3
Sec. 3	4
Sec. 4	4
Sec. 5	4
Sec. 6	4
United States Code, Title 28:	
Section 344	6
Section 878	2, 12

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SUPREME COURT OF LOUISIANA

No. 38,833

THEOPHILE O. HOTARD AND ALLEN H. JOHNESS,
Appellants,

vs.

CITY OF NEW ORLEANS, ET AL.,
Appellees

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

MOTION OF APPELLEES TO DISMISS OR AFFIRM AND STATEMENT OF GROUNDS MAKING AGAINST JURISDICTION AND MOTION OF APPELLEES FOR DAMAGES UPON DISMISSAL OR AFFIRMANCE.

Come now the Appellees, City of New Orleans; Chicago, St. Louis and New Orleans Railroad Company; Gulf, Mobile & Ohio Railroad Company; Illinois Central Railroad Company; Louisiana & Arkansas Railway Company; Louisville and Nashville Railroad Company; Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor; New Orleans and Northeastern Railroad Company; New Orleans Terminal Company; Texas and New Orleans Railroad Company; The Texas and Pacific Railway Company; and Texas

Pacific-Missouri Pacific Terminal Railroad of New Orleans, through their respective undersigned counsel, and file herewith their motion to dismiss or, in the alternative, to affirm, the appeal, and their statement of the grounds making against the jurisdiction of the Supreme Court of the United States of this cause, pursuant to the provisions of Rules 7 and 12 of said Court, and their motion for damages for delay upon dismissal or affirmance, pursuant to the provisions of U. S. C. Title 28, Section 878.

A

Motion to Dismiss or Affirm

Appellees move the Supreme Court of the United States to dismiss the appeal taken herein to said Court by appellants, Theophile O. Hotard and Allen H. Johness, on the ground that they have failed to comply with the rules of said Court with reference to the taking of appeals to it in that: (a) They have not filed any Jurisdictional Statement and have not within five days from the allowance of their appeal served on movers copy of such Jurisdictional Statement or of a statement directing attention to the provisions of paragraph 3 of Rule 12 of the Rules of the said Court, and (b) When the appeal was allowed, no citation to the appellees was signed by the Justice allowing the appeal, as required by paragraph 1 of Rule 10.

Appellees moreover move the Supreme Court of the United States to dismiss or, in the alternative, to affirm with costs, the appeal taken herein to the said Court by appellants, Theophile O. Hotard and Allen H. Johness, on the grounds that the record affirmatively shows no proper presentation of any Federal question of such character as would sustain jurisdiction on appeal and particularly that

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the record affirmatively shows that this case involves no substantial Federal question.

Appellees submit, in support of said motion, the following:

B

Statement of Grounds as to Appellants' Failure to Comply With the Rules of the Supreme Court of the United States in Attempting to Take Their Appeal.

(a) The Absence of Jurisdictional Statement

Rule 12 of the Rules of the Supreme Court of the United States provides in the opening sentence of paragraph 1 thereof that

> "Upon the presentation of a petition for the allowance of an appeal to this court, from any court, to any judge or justice empowered by law to allow it, there shall be presented by the applicant a separate typewritten statement particularly disclosing the basis upon which it is contended that this court has jurisdiction upon appeal to review the judgment or decree in question."

The balance of said paragraph 1 sets out minutely and in precise detail what the said statement shall contain.

Paragraph 2 of the rule is as follows:

> "If the appeal is allowed, the appellant shall serve upon the appellee within 5 days after such allowance (a) a copy of the petition for and order allowing the appeal, together with a copy of the assignments of error and of the statement required by paragraph 1 of this rule, and (b) a statement directing attention to the provisions of paragraph 3 of this rule. Proof of service of the papers required by this paragraph to be served shall be filed forthwith with the clerk of the court possessed of the record, and shall be incorpo-

rated by him in the transcript of record prepared for this court upon the appeal."

Paragraph 3 provides for the filing by appellee with the clerk of the court possessed of the record a typewritten statement disclosing any matter or ground making against the jurisdiction of this court in which may be included a motion to dismiss or affirm.

Paragraph 4 makes it mandatory on the clerk of the court possessed of the record to include in the transcript the statements and motions required and permitted to be filed under the provisions of the said rule.

Paragraph 5 provides that after the docketing of the case in this court and the filing of the transcript

> ". . . the clerk of this court shall forthwith print the appellant's statement required by paragraph 1 of this rule and the opposing statement, and motions, if any, permitted by paragraph 3 of this rule, and the clerk shall thereupon distribute such printed papers to the court for its consideration."

Paragraph 6 is as follows:

> "If either appellant or appellee fails to comply with the provisions of this rule, the clerk of this court shall report such failure to the court immediately so that this court may take such action as it deems proper."

It is respectfully submitted that the filing of the Jurisdictional Statement is absolutely sacramental, for that is the sole and only method by which the appellant's contention that this court has jurisdiction of the appeal is presented to this court; and that therefore the failure to file a Jurisdictional Statement requires the dismissal of the appeal because not taken as specifically provided by the Rules.

Under the Rule the Jurisdictional Statement should have

been filed contemporaneously with the presentation of the petition for appeal. That was not done.

Furthermore, paragraph 2 of the Rule requires that among other things to be served on appellees within 5 days after the allowance of the appeal were a copy of the Jurisdictional Statement and a statement directing attention to the provisions of paragraph 3 of the Rule, and that proof of service of such documents be filed forthwith with the Clerk of the Court possessed of the record. None of these requirements was met. Obviously, a copy of the Jurisdictional Statement could not be served, since none has ever been filed.

Absence of these essential matters and things makes it impossible for this Court to consider any jurisdictional contentions which appellants may have in mind.

For these defaults the appeal should be dismissed.

(b) The Failure as to Citation

There was also a failure to comply with the requirement of paragraph 1 of Rule 10 that "When an appeal is allowed a citation to the appellee shall be signed by the judge or justice allowing the appeal." No such citation was signed when the appeal was allowed nor, indeed, since.

This is another omission requiring the dismissal of the appeal.

C

Record Affirmatively Shows No Federal Question of Substantial Character and No Proper Presentation of Any Federal Question.

(a) Essentials of Jurisdictional Showing

We do not rest merely upon the complete failure of appellants to file the Jurisdictional Statement required by Rule

12, paragraph 1, and we now proceed to demonstrate the complete absence of any jurisdictional basis for this appeal and the affirmative showing made by the record that this case involves no Federal question of a substantial character and no proper presentation of any Federal question.

In the absence of a Jurisdictional Statement specifying the statutory provision believed by appellants to sustain the asserted appellate jurisdiction, we assume that this statutory provision is the following portion of U. S. C. Title 28, Section 344:

> ". . . where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity . . ."

In *Rescue Army* v. *Municipal Court*, 331 U. S. 543, the opinion, referring to this statutory provision and Rule 12, paragraph 1, emphasizes (P. 568):

> ". . . the necessity for reasonable clarity and definiteness, as well as for timeliness, in raising and presenting constitutional questions."

(b) Analysis of Opinions of Louisiana Supreme Court

As the reported opinion of the Louisiana Supreme Court herein shows (35 So. 2d 752), this suit involves an unsuccessful effort to prevent works of great public improvement in the City of New Orlenas through an attack upon the validity of a contract between the municipality and the railroads for the construction and operation of a Union Station and for numerous grade separations. The making of this contract by the municipality was authorized by a constitutional amendment submitted to the voters of Louisiana through the enactment of Act 385 of 1938, which upon

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the affirmative vote of the electorate in that year became Section 31.3 of Article XIV of the State Constitution.

As appears from the opinion of the Louisiana Supreme Court and the two dissenting opinions, numerous issues of State law were litigated and resolved against the appellants, both in the trial court and on appeal, but no suggestion of any Federal question being regarded as involved and determined in this litigation appears anywhere in these opinions, even in the lengthy and vigorous dissenting opinion of Mr. Justice Fournet.

The issues determined herein by the Louisiana Supreme Court are described in almost identical language in the following passages quoted from the opinion of the Court and from this dissenting opinion:

Opinion of Court	*Dissenting Opinion*
"The argument for the appellants resolves itself into two main divisions: (1) an attack upon the validity of the constitutional amendment, and (2) an attack upon certain provisions of the contract itself" (Page 754).	"The challenges which these parties have levelled at the contract's validity may be divided broadly into an attack on (1) the constitutionality of Act No. 385 of 1938, which authorized the submission of this amendment to the people for ratification, and (2) the legality of the contract itself" (Page 760).

We also direct particular attention to the summary in this dissenting opinion of the grounds upon which appellants assailed the constitutional amendment which authorized this contract and challenged the validity of the contract itself (Pages 760-761). It amply appears from this full statement of the issues resolved against appellants by the Louisiana Supreme Court, over this objection and dissent of Mr.

Justice Fournet, that questions of State law alone were litigated and adjudicated and that no Federal question arose in the case. There was also a dissenting opinion by Mr. Justice Ponder (Pages 759-760), but that dissent likewise suggests no Federal question and deals only with an issue of purely State law—the contention that a provision in the contract as to annual appropriations from the municipal revenues violated a provision in the State Constitution (Section 24 of Article XIV).

To sum up, all the opinions of the Louisiana Supreme Court show that, in determining the validity of the constitutional amendment under which the municipality entered into this contract, the questions dealt with involved compliance, in the procedure of submitting and adopting this constitutional amendment, with the provisions of Section 1 of Article XXI of the Constitution of Louisiana, prescribing the manner for submitting constitutional amendments to a vote of the electorate, as interpreted in *Graham* v. *Jones,* 198 La. 507, 3 So. 2d 761. There is no suggestion in these opinions that any Federal question was involved and adjudicated in the determination of these issues of purely State law.

Likewise these opinions show that, in passing upon the validity of the contract itself, the Louisiana Supreme Court dealt with the extent of contractual power conferred upon the municipality in this field by Section 31.3 of Article XIV of the State Constitution (Act 385 of 1938). Such questions of extent of the authority which State law confers upon a municipality are obviously likewise questions of purely State law.

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(c) Initial Pleading of Plaintiff

The petition by which appellants instituted this suit contains only the vaguest and most illusory references to Federal questions. Article IV of the petition avers:

> "That Act 385 of 1938 does not so provide and is unconstitutional, under the State Constitution, in the manner of its submission and adoption, in its contents and deprives petitioners of their property without due process of law and does not afford them the equal protection of the law under both the State and Federal Constitutions, for the reasons hereinafter alleged."

Article X of the petition reads as follows:

> "That whatever property the City may acquire in adjacent parishes or may construct thereon becomes exempt from every form of taxation whatsoever (Sec. 1, Para. 6), decreasing the security of the bonds of said parishes secured by said property and impairing the obligations of contracts."

However, plaintiffs did not sue as bondholders, nor did they even allege themselves to be bondholders, and they are on the face of the record absolutely without any interest in any Federal question which may be suggested by this averment.

The only other possible mention of a Federal question in the petition is Article XVI, which follows averments that the electors were misinformed and misled at the 1938 election by the language on the ballot referring to the constitutional amendment proposed by Act 385 of 1938. This article of the petition reads as follows:

> "That same did not give said electors sufficient notice to afford them due process of law."

These three extracts from this initial pleading of the plaintiffs constitute all the showing made by the record as

to any effort on their part in this case to raise and to have adjudicated any Federal questions. Apart from the problem of whether there is "reasonable clarity and definiteness" in these averments, it is obvious, from the omission of any mention of these issues anywhere in any of the opinions of the Louisiana Supreme Court, that the questions sought to be raised by these paragraphs of the petition must have impressed that Court as wholly lacking in substance.

(d) Issues of State Constitutional Present no Federal Question

The opinions of the Louisiana Supreme Court show a dealing with only issues of State law—the validity of the adoption of the State constitutional amendment under which this power was exercised by the municipality; the relationship between the substance of this State constitutional amendment and other provisions of the State Constitution; and the conformance of the power exercised by the municipality under this State constitutional amendment with the grant of power and authority contained in that enactment.

Questions of State constitutional law are non-Federal in character, whether they arise in connection with ordinary legislation or State constitutional provisions. Decisions so recognizing as to the latter classification are as follows:

In re Kemmler, 136 U. S. 436, 447.

> "The decision of the state courts sustaining the validity of the act under the state constitution is not reexaminable here . . ."

Ross v. *Oregon*, 227 U. S. 150, 164.

> "The state court ruled that the amendment to the state constitution was prospective and did not affect pending cases. Error is now assigned upon that ruling. But

it involved nothing more than the construction of the constitutional amendment, which was a question of local law, and its decision by the state court is not reviewable here."

Memphis & Charleston Ry. Co. v. *Pace*, 282 U. S. 241, 244.

"The Supreme Court of the State in the decision under review holds that the creation of the road district, the issue of the bonds and the levy of the tax were all valid under the state constitution and the acts before cited; that the board of supervisors in creating the district acted in a legislative capacity, they being invested by the constitution and statutes of the State with discretion to create the district, or refuse to create it, according to their judgment of the best interests of all concerned; and that the two confirmatory acts were valid under the state constitution and operated to make the district a legislatively created district if it was not such before. These were all questions of state law, and their decision by that court is controlling here."

Utley v. *St. Petersburg*, 292 U. S. 106, 110.

". . . What the appellants really claim is this, that the remedy, though adequate on its face, is made inadequate by provisions of the Florida constitution, which are said to condemn it. We do not elaborate the argument, for the conflict, if there is any, between the statute regulating this improvement and the local constitution must be adjudged, not by us, but by the courts of the locality."

For the foregoing reasons, we submit that the appeal should be dismissed, or affirmed with costs.

D

Motion for Damages upon Dismissal or Affirmance

In the event of dismissal or affirmance, appellees move the Supreme Court of the United States for an order award-

ing damages against appellants, under U. S. C. Title 28, Section 878, for delay in taking an appeal to said Court on frivolous and unsubstantial grounds.

E

Appropriate Damages Should Be Awarded Against Appellants

This motion is based on U. S. C. Title 28, Section 878 (formerly R. S. Section 1010), which reads as follows:

> "Where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court of appeals, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion."

We will now proceed to set forth the authorities which justify the award of damages, on dismissal or affirmance, in cases where the Court is convinced that the appeal is frivolous and taken merely for the purpose of delay.

In *Amory* v. *Amory*, et al, 91 U. S. 356, the Court said:

> "We can adjudge damages under Section 1010, Revised Statutes, and Rule 23 in all cases where it appears that a writ of error has been sued out merely for delay. This gives us the only power we have to prevent frivolous appeals, and writs of error; and we deem it not improper to say that this power will be exercised without hesitation in all cases where we find that our jurisdiction has been invoked merely to gain time."

In *Gibbs* v. *Diekma*, 131 U. S., Appendix clxxxvi, the Court said:

> "The decree is affirmed, and it is so apparent the appeal was vexatious and for delay only, that we adjudge to the appellees five hundred dollars as just

damages for their delay. While Section 1010 of the Revised Statutes includes in express terms, writs of error only, Section 1012 provides that appeals from the Circuit and District Courts shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in all cases of writs of error. This gives us authority to adjudge damages for delay on appeals as well as writs or error, and our power is not confined to money judgments only."

In *Whitney* v. *Cook*, 131 U. S., Appendix cxcvii, the Syllabus reads:

"Damages are awarded in a case where the appeal was taken for delay and was frivolous."

Not only does the record herein affirmatively show that no Federal question of a substantial character is presented, but, as indicative of the motives which prompted the appellants to take the appeal, we point out that the Supreme Court of Louisiana denied a rehearing on April 26, 1948, and plaintiffs waited until July 24, 1948, before filing the petition for appeal, and then completely failed to comply with the clear and positive requirements of Rule 12, paragraph 1.

In *Deming* v. *Carlisle Packing Company*, 226 U. S. 102, the Syllabus reads in part as follows:

"Even though the record may present in form a Federal question, the writ of error will be dismissed if it plainly appear that the Federal question is so unsubstantial and devoid of merit as to be frivolous.

• • • • • • •

"The unsubstantial and frivolous character of the only Federal question presented in this case embraces the conclusion that the writ was prosecuted for delay.

• • • • • • •

"Under Rule 23, which is based on Section 1010, Revised Statutes, this Court has the same power to award damages for delay where the writ or error is dismissed as where there is judgment of affirmance; and in this case five per cent damages are imposed in addition to costs."

We also quote from *Slaker, Administrator,* v. *O'Connor,* 278 U. S. 188, 190, where the Court said:

"The above provisions were considered in Deming *v.* Carlisle Packing Co., 226 U. S. 102, 106, and Wagner Electric Co. *v.* Lyndon, 262 U. S. 226, 233. Together those cases determine that where a writ of error or appeal is dismissed because the alleged ground therefor is so unsubstantial as to be frivolous, a penalty may be imposed. In the first cited case—writ of error to state court—penalty of five per centum was imposed upon the plaintiff in error; in the second—an appeal from federal court—the appellant was subjected to penalty of fifteen hundred dollars and required to pay the costs. See also Gibbs *v.* Diekma, 131 U. S. Appendix clxxxvi.

"Here, without any authority of law, the appellant obtained an appeal. Thereby he has needlessly consumed our time and imposed serious delay upon the appellees and otherwise burdened them."

We also refer to the contemporaneous decision in *Roe* v. *Kansas, ex rel, Smith, Attorney General,* 278 U. S. 191, wherein the Court awarded damages for a frivolous appeal in a condemnation case.

In *Wagner Electric Manufacturing Company* v. *Lyndon,* 262 U. S. 226, the Court dismissed an appeal from the Circuit Court of Appeals. On appellee's Motion for Damages, the Court said (Page 233):

"An objection to allowing damages in the present case suggesting itself is that the decree appealed from

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was not a money judgment. It is true that this whole litigation in the federal jurisdiction has been initiated and carried on solely to secure the delay of the payment of a money judgment in the state court, but that is hardly within the exact terms of the twenty-third rule. Sections 1010 and 1012, Revised Statutes, are, however, not so restrictive, and they give this court power to impose just damages upon the affirmance of any judgment or decree, for delay. Gibbs *v.* Diekma, 131 U. S., Appendix clxxxvi.

"The case should be dismissed for lack of jurisdiction, because the grounds of appeal are frivolous. In a dismissal on this ground a penalty may be imposed, just as if upon an affirmance. Deming *v.* Carlisle Packing Co., 226 U. S. 102, 109. (33 Sup. Ct. 80, 57 L. Ed. 140.)

"We think that damages of $1,500 for delay are not excessive in this case. We therefore direct the dismissal of the appeal, with damages of $1,500 and the taxation of costs as upon an affirmance of the decree of the District Court."

In *Deming* v. *Carlisle Packing Company*, 226 U. S. 102, cited above, the Court held specifically that the power to award damages for a frivolous appeal extends to cases where the appeal is dismissed, just the same as if the decision of the lower court had been affirmed on appeal. Said the Court (Page 110):

"Because of the absolute coincidence between a dismissal on account of the frivolous and unsubstantial character of the Federal question relied upon and an affirmance upon the same ground, we are of opinion that the statutory authority to impose the penalty obtains in either case."

In the present case, the record shows an attempt by appellants to delay and prevent works of great public improvement in the City of New Orleans. The decisions be-

low were all in favor of appellees. We submit that the record itself is the best proof that this appeal was taken merely for delay. We therefore respectfully ask that, upon dismissal or affirmance, an award of substantial damages be made against appellants.

August 9, 1948.

Respectfully submitted,

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MOTION FILED SEP 15 1948

FILED
OCT 11 1948
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 259

THEOPHILE C. BOTARD AND ALLEN H. JOHNESS,
Appellants,
vs.
CITY OF NEW ORLEANS, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

MOTION FOR LEAVE TO FILE SUPPLEMENTAL STATEMENT OPPOSING JURISDICTION, MOTION TO DISMISS OR AFFIRM AND MOTION FOR DAMAGES.

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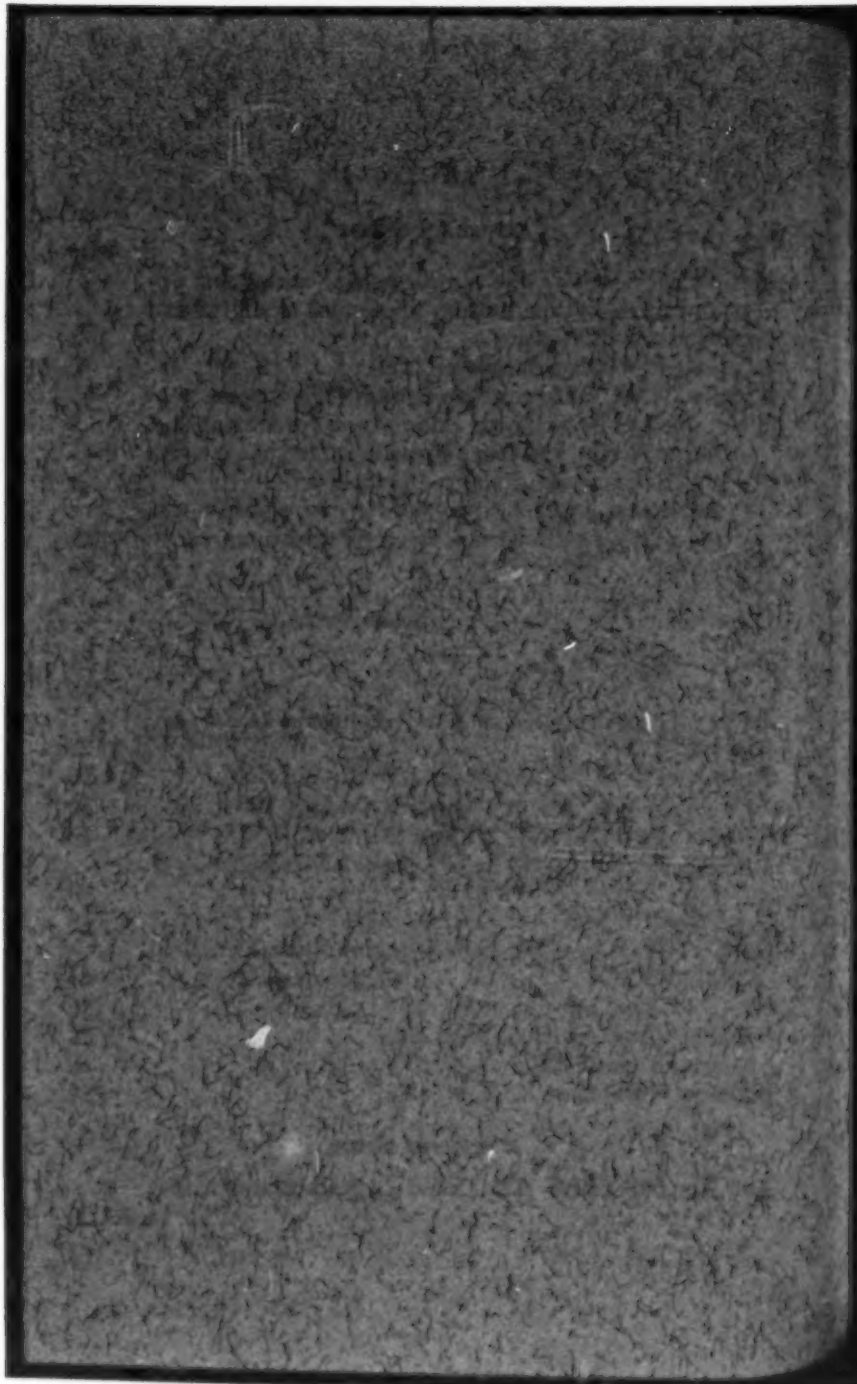
Counsel for Appellees.



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INDEX

Subject Index

	Page
Motion for leave to file supplemental statement opposing jurisdiction, motion to dismiss or affirm and motion for damages	1
Affidavit of Walter J. Suthon, Jr.	5
Supplemental statement opposing jurisdiction, motion to dismiss or affirm and motion for damages	9
Argument on failure of appellants to comply with essential procedural requirements	9
Argument against jurisdiction and against substantiality of asserted Federal questions	11
Conclusion	20

Table of Cases Cited

Burt v. *Smith*, 203 U. S. 129	14
Calder v. *Bull*, 3 Dall. 386	15
Endicott Johnson Corporation v. *Encyclopedia Press*, 266 U. S. 285	20
Hotard v. *City of New Orleans*, 35 So. (2d) 755	16
Jackson ex dem. Hart v. *Lamphire*, 3 Pet. 280	15
Montana, ex rel. Haire v. *Rice*, 204 U. S. 291	14
Myles Salt Co. v. *Board of Commissioners*, 239 U. S. 478	19
Neblett v. *Carpenter*, 305 U. S. 297	18
Ohio, ex rel. Bryant v. *Akron Metropolitan Park District*, 281 U. S. 74	18
Opelika v. *Opelika Sewer Co.*, 265 U. S. 215	19
Smith v. *Jennings*, 206 U. S. 276	14
Soliah v. *Heskin*, 222 U. S. 522	18
Withers v. *Buckley*, 20 How. 84	15

Statutes Cited

Act No. 385 ofthe Louisiana Legislature of 1938, 11, 14, 19, 20

Page

Constitution of Louisiana:
Article XIV, Sec. 31.3 11
Article XXI, Sec. 1 ..... 11, 12, 16
Constitution of the United States, 14th Amendment 18
Coley's "Constitutional Limitations," 8th Edition, Vol. 1, p. 88 13
Rules of the Supreme Court of the United States:
Rule 10, par. 1 11
Rule 12:
Par. 1 ..... 10, 11
Par. 2 11
Par. 3 ..... 6, 7
United States Code, Title 28, Section 350 10

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 259

THEOPHILE O. HOTARD AND ALLEN H. JOHNESS,
Appellants,

vs.

CITY OF NEW ORLEANS, ET AL.,
Appellees

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL MOTION TO DISMISS OR AFFIRM, A SUPPLEMENTAL STATEMENT MAKING AGAINST JURISDICTION, AND A SUPPLEMENTAL MOTION FOR DAMAGES UPON DISMISSAL OR AFFIRMANCE.

To the Honorable, the Supreme Court of the United States:

Come now the Appellees:

City of New Orleans,
Chicago, St. Louis and New Orleans Railroad Company,
Gulf, Mobile & Ohio Railroad Company,
Illinois Central Railroad Company,
Louisiana & Arkansas Railway Company,
Louisville & Nashville Railroad Company,

Guy A. Thompson, Trustee; Missouri Pacific Railroad Company, Debtor,
New Orleans and Northeastern Railroad Company,
New Orleans Terminal Company,
Texas and New Orleans Railroad Company,
The Texas and Pacific Railway Company, and
Texas-Pacific-Missouri Pacific Terminal Railroad of New Orleans,

through their respective counsel, and move this Court for leave to file the attached supplemental motion to dismiss or affirm, supplemental statement making against jurisdiction, and supplemental motion for damages upon dismissal or affirmance (to which is annexed an affidavit of Walter J. Suthon made September 1, 1948) and respectfully submit as grounds for the allowance of such motion that because at the time of their filing on August 9, 1948, in the Supreme Court of Louisiana their motion to dismiss or affirm and their statement of grounds making against jurisdiction, and their motion for damages upon dismissal or affirmance there had not been filed (as required by Paragraph 1 of Rule 12 of this Court) a statement of appellants in support of jurisdiction, which document was filed on August 17, 1948, they were without information requisite for the adequate presentation to the court of the matters and things helpful to the court's consideration.

September 3, 1948.

Respectfully submitted,

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JOHN C. FOSTER,
Attorney for Gulf, Mobile & Ohio Railroad Company;
R. E. MILLING, JR.,
Attorney for Louisiana & Arkansas Railway Company;
HARRY MCCALL,
Attorney for Louisville & Nashville Railroad Company, and Texas & New Orleans Railroad Company;
LEONARD B. LEVY,
Attorney for Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, The Texas & Pacific Railway Company, and Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans;
J. BLANC MONROE,
WALTER J. SUTHON, JR.,
Attorneys for New Orleans & Northeastern Railroad Company and New Orleans Terminal Company.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 259

THEOPHILE O. HOTARD AND ALLEN H. JOHNESS,
Appellants,

vs.

CITY OF NEW ORLEANS, ET AL.,
Appellees

APPEAL FROM THE SUPREME COURT OF LOUISIANA

Affidavit of Walter J. Suthon, Jr.

STATE OF LOUISIANA,
Parish of Orleans, ss:

WALTER J. SUTHON, JR., being duly sworn, deposes and says:

That he is an attorney at law and one of the attorneys of record herein for Appellees, New Orleans & Northeastern Railroad Company and New Orleans Terminal Company, and that he acted on behalf of all appellees in the matters set forth in this affidavit and in the making of this affidavit.

That following the filing in the Supreme Court of Louisiana herein on August 17, 1948, of the Statement of Appellants in Support of Jurisdiction, copies of that

jurisdictional statement were served upon appellees through their counsel by registered mail on August 19, 1948; that affiant accordingly proceeded in conjunction with other counsel for appellees to prepare for filing in the Supreme Court of Louisiana the attached Supplemental Motion of Appellees to Dismiss or Affirm and Supplemental Statement of Grounds Making Against Jurisdiction and Supplemental Motion of Appellees for Damages upon Dismissal or Affirmance, which appellees are entitled to file within fifteen days from the date of the aforesaid service upon them on August 19, 1948, under the provisions of Paragraph 3 of Rule 12 of the Rules of the United States Supreme Court; that upon the completion of the preparation of the attached Supplemental Motion of Appellees to Dismiss or Affirm and Supplemental Statement of Grounds Making Against Jurisdiction and Supplemental Motion of Appellees for Damages Upon Dismissal or Affirmance, affiant on this date, in preparation for the filing of said document with the Clerk of the Supreme Court of Louisiana, caused enquiry to be made of said Clerk as to the status of the record in this cause, and affiant was informed through said enquiry by the Clerk of the Supreme Court of Louisiana that he had delivered the record in this cause on the appeal taken by the above named appellants to Robert J. Lacey, Jr., Esquire, Counsel for said appellants, several days ago, for filing in the United States Supreme Court; that affiant accordingly did not file the attached document with the Clerk of the Supreme Court of Louisiana, since the record for this appeal had already left his custody and possession, and as affiant understands, has been filed or is now about to be filed with the Clerk of the Supreme Court of the United States; that affiant accordingly executes this affidavit for the purpose of explaining why the attached document, originally prepared for filing in the Supreme Court of Louisiana, has not been filed there, and is being

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filed in the Supreme Court of the United States, and for the purpose of fixing of record the date (August 19, 1948) upon which appellees were served herein with copies of the Statement of Appellants in Support of Jurisdiction as the date from which the period of fifteen days allowed for the filing of the attached document begins to run, under the provisions of Paragraph 3 of Rule 12 of the Rules of the United States Supreme Court.

WALTER J. SUTHON, JR.

Sworn to and Subscribed before me on this 1st day of September, 1948.

ROBERT G. POLACK,
Notary Public.

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SUPREME COURT OF LOUISIANA

No. 38833

THEOPHILE O. HOTARD AND ALLEN H. JOHNESS
Appellants,

vs.

CITY OF ORLEANS, ET AL.,
Appellees

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

SUPPLEMENTAL MOTION OF APPELLEES TO DISMISS OR AFFIRM AND SUPPLEMENTAL STATEMENT OF GROUNDS MAKING AGAINST JURISDICTION AND SUPPLEMENTAL MOTION OF APPELLEES FOR DAMAGES UPON DISMISSAL OR AFFIRMANCE.

Come now the Appellees:

City of New Orleans,
Chicago, St. Louis and New Orleans Railroad Company,
Gulf, Mobile & Ohio Railroad Company,
Illinois Central Railroad Company,
Louisiana & Arkansas Railway Company,
Louisville & Nashville Railroad Company,

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor,
New Orleans and Northeastern Railroad Company,
New Orleans Terminal Company,
Texas and New Orleans Railroad Company,
The Texas and Pacific Railway Company, and
Texas-Pacific-Missouri Pacific Terminal Railroad of New Orleans,

through their respective undersigned counsel, and, following the filing herein on August 17, 1948, of the Statement of Appellants in Support of Jurisdiction, and the service of that Jurisdictional Statement on appellees on August 19, 1948, appellees now reiterate their motion to dismiss or affirm and their statement of grounds making against jurisdiction, and their motion for damages upon dismissal or affirmance, filed herein on August 9, 1948, and in further support of said motions and said statement of grounds making against jurisdiction, appellees make the following supplementary averments:

I. Argument on Failure of Appellants to Comply With Essential Procedural Requirements

The Jurisdictional Statement of appellants, which should have been filed herein upon the presentation of the petition for the allowance of the appeal on July 24, 1948, as required by Paragraph 1 of Rule 12 of the Supreme Court of the United States, was not filed until August 17, 1948, more than three weeks after the date when it should have been filed and more than three weeks after the expiration of the period of time allowed for an application for an appeal to the Supreme Court of the United States under United States Code, Title 28, Section 350.

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In addition to this tardy filing of the Jurisdictional Statement, appellants have also failed to comply with the following appeal requirements:

(a) In serving copies of their Jurisdictional Statement upon appellees, appellants have failed to serve the statement directing attention to the provisions of Paragraph 3 of Rule 12, as required by Paragraph 2 of Rule 12.

(b) Appellants have failed to append to their Jurisdictional Statement copies of the opinions in the cause sought to be reviewed, as required by Paragraph 1 of Rule 12.

(c) Appellants have not had a citation of appeal signed by the Judge or Justice allowing the appeal until August 23, 1948, thirty days after the appeal was applied for and allowed, notwithstanding the provisions of Paragraph 1 of Rule 10 that this citation shall be signed when the appeal is allowed.

II. Argument Against Jurisdiction and Against Substantiality of Asserted Federal Questions

Appellants in their Jurisdictional Statement predicate their asserted right of appeal to the United States Supreme Court chiefly upon the nebulous complaint that their Federal rights were violated by the failure of the Louisiana Supreme Court to recognize and hold that the constitutional amendment embodied in Act 385 of 1938, which became Section 31.3 of Article XIV of the Louisiana Constitution by the affirmative vote of the electorate, is invalid under the "one amendment" provision of Section 1 of Article XXI of the Louisiana Constitution. In view of the emphasis placed on this point, we shall now supplement and amplify our demonstration that this issue involves solely and exclusively questions of State law and presents no Federal question.

It is elementary that there is nothing in the Federal Constitution which requires a complex amendment to a State Constitution to be submitted to the State electorate as several separate amendment proposals, rather than as a single amendment proposal. The "one amendment" rule in Louisiana results solely from a provision of the State Constitution (Art. XXI, Sec. 1) reading as follows:

> "• • • When more than one amendment shall be submitted at the same election, they shall be so submitted as to enable the electors to vote on each amendment separately. • • •"

In holding that Act 385 of 1938 complied with this "one amendment" rule, the Louisiana Supreme Court said:

> "The constitutional amendment in question is really only one amendment, authorizing the city to establish and maintain one or more railroad passenger stations, and, as an incident thereto, to eliminate certain grade crossings of tracks entering the station or stations. This new section—31.3 of Article 14—is necessarily a long section because it embodies all of the details concerning the authority which was conferred upon the city. It covers nearly five pages of the Constitution; but all of its provisions relate to the one purpose of authorizing the city, acting through the Public Belt Railroad Commission, to construct, maintain and operate one or more passenger stations, and, as an incident thereto to eliminate grade crossings." (35 So. 2d. at p. 755.)

This is a determination of what is purely and simply a question of State law. The general principle that amendments to a State Constitution are matters for determination by the State, unless a provision thereby incorporated into the State Constitution would make the law of the State encroach upon a subject as to which action by the State is

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forbidden by the Federal Constitution, is stated as follows in Cooley's *Constitutional Limitations* (8th. Ed.), v. I, p. 88:

"V. The power of the people to amend or revise their constitutions is limited by the Constitution of the United States in the following particulars:

1. It must not abolish the republican form of government, since such act would be revolutionary in its character, and would call for and demand direct intervention on the part of the government of the United States.

2. It must not provide for titles of nobility, or assume to violate the obligation of any contract, or attaint persons of crime, or provide ex post facto for the punishment of acts by the courts which were innocent when committed, or contain any other provision which would, in effect, amount to the exercise of any power expressly or impliedly prohibited to the States by the Constitution of the Union. For while such provisions would not call for the direct and forcible intervention of the government of the Union, it would be the duty of the courts, both State and national, to refuse to enforce them, and to declare them altogether void, as much when enacted by the people in their primary capacity as makers of the fundamental law, as when enacted in the form of statutes, through the delegated power of their legislatures.

"VI. Subject to the foregoing principles and limitations, each State must judge for itself what provisions shall be inserted in its constitution; how the powers of government shall be apportioned in order to their proper exercise; what protection shall be thrown around the person or property of the citizen; and to what extent private rights shall be required to yield to the general good. And the courts of the State, still more the courts of the Union, would be precluded from inquiring into the justice of their action, or questioning its validity, because of any supposed conflict with fundamental rules of right or of government, unless

> they should be able to show collision at some point between the instrument thus formed and that paramount law which constitutes, in regard to the subjects it covers, the fundamental rule of action throughout the whole United States."

It is also elementary that no provision of the Federal Constitution forbids State action on the subjects covered by Act 385 of 1938—the construction and operation of a union station, the elimination of grade crossings, etc.

What appellants really seek is a review by the United States Supreme Court of the merits of the decision of the Louisiana Supreme Court that this particular constitutional amendment was submitted and adopted in valid consonance with the pertinent provisions of the Louisiana Constitution. The following decisions demonstrate that such a case involves no Federal question:—

Smith, Receiver v. *Jennings, Treasurer,* 206 U. S. 276, 278:

> "But the conformity with the state constitution of the proceedings in the enactment of the law is a question for the determination of the state court and its judgment is final. Burt *v.* Smith, 203 U. S. 129, 135; Haire *v.* Rice, 204 U. S. 291."

Burt v. *Smith,* 203 U. S. 129, 135:

> "It is argued that the Court of Appeals exceeded its functions under the constitution of the State, and in that way denied the plaintiffs due process of law. We see no reason to think so, but with that question we have nothing to do. French *v.* Taylor, 199 U. S. 274 Rawlins *v.* Georgia, 201 U. S. 638."

Montana ex rel. Haire v. *Rice.* State Treasurer, 204 U. S. 291, 301:

> "It is further claimed by the plaintiff in error that the Supreme Court of the State erred in holding that

the law under which bonds were issued and the proceeds of public lands devoted to their payment was repugnant to the constitution of the State. Upon this question the decision of that court is conclusive, and plainly we have no power to review it."

Indeed, it has been the settled jurisprudence of the United States Supreme Court from its earliest days that it possesses no power of appellate review in State Court cases involving the contention that a State enactment has violated a provision of the State Constitution. Early leading decisions to this effect are as follows:—

Calder v. *Bull*, 3 Dall. 386, 392:

"... this court has no jurisdiction to determine that any law of any state legislature, contrary to the constitution of such state, is void."

Jackson ex dem. Hart v. *Lamphire*, 3 Pet. 280, 289:

"This court has no authority, on a writ of error from a state court, to declare a state law void on account of its collision with a state constitution."

Withers v. *Buckley*, 20 How. 84, 89:—

"Nor has it been deemed the province of this court to abrogate or overrule the interpretation put upon their own respective statutes by the courts of the several states, whether such interpretation had reference to the ordinary rights of person or property, or to the nature and extent of the legislative powers vested by the constitutions of the several States, and their coincidence with acts of legislation performed under the delegation of those powers. These are functions wisely and necessarily left by this court untouched in the State tribunals, the assumption of which by the federal judiciary, as it would embrace every matter upon which the governments of the State could operate, would, in effect, amount to the annihilation of those governments."

While appellants disclaim attacking the "one amendment" provision of the Louisiana Constitution (Article XXI, Sec. 1), it is obvious that what their appeal seeks to do on this branch of the case is to have the Supreme Court of the United States substitute for the decision of the Louisiana Supreme Court, favourable to appellees on this issue of State law (see p. 755 of 35 So. 2d), the dissenting opinion of Mr. Justice Fournet, expressing a diametrically opposing view on this question of State law (see p. 762, ff., of 35 So. 2d).

Appellants in their Jurisdictional Statement concede (p. 5) that the opinion of the Louisiana Supreme Court neither recognizes nor suggests that any Federal question was involved and determined in this litigation. They emphasize, however, the reference in the dissenting opinion of Mr. Justice Fournet to "the applicable constitutional provisions and jurisprudence" (see p. 761 of 35 So. 2d). A reading of the entire dissent will show an extended discussion of several questions of State constitutional law, but no reference at all to any questions of Federal constitutional law. It is thus obvious that this dissenting jurist must have had in mind his expressed view that this constitutional amendment violated the various provisions of the State Constitution, which he sets forth at length in his dissenting opinion, and that he did not have in mind any provisions of the Federal Constitution when he spoke of "the applicable constitutional provisions." This dissenting opinion specifically enumerates the following seven provisions of the State Constitution which this dissenting jurist thought violated by the constitutional amendment in controversy:—

Article III
Article IV, Section 12.
Article VII
Article XIV, Section 14.
Article XIV, Section 24.
Article XIV, Section 26.
Article XXI, Section 1.

This dissenting opinion thus strongly corroborates our contention that the case involves only issues of State law, and affords no assistance whatever to the efforts of appellants to discover and develop a substantial Federal question as the basis for an appeal to the United States Supreme Court.

The significant and fatal weakness of the Jurisdictional Statement is the inability of appellants to cite a single decision of the United States Supreme Court, or of any other court, holding specifically that the "due process" clause of the Federal Constitution applies to the procedure for amending a State Constitution, or a single decision invalidating an amendment to a State Constitution on the specific ground that the procedure for its adoption violated the requirements of the "due process" clause of the Federal Constitution. On this major point in the effort of appellants to have the case reviewed by the United States Supreme Court, appellants can cite no pertinent decision, and their argument is simply a contention that their own illogical *ipse dixit* should be taken as the controlling authority on this question of constitutional law.

Appellants also complain of the delegation of power by the municipality to the Committee created by the contract for supervising or controlling the acquisition, construction, maintenance and operation of the Union Station. The Louisiana Supreme Court pointed out that the constitutional amendment in question specifically authorized the delegation of these powers to this Committee (see p. 758 of 35 So. 2d.).

The Jurisdictional Statement of appellants fails to show by any specific record reference any attempt to seasonably raise or even suggest a Federal question on this aspect of the case. However, even if appellants had gone through the form of seasonably asserting a Federal question on this point, that assertion would obviously have been unsub-

stantial and groundless, as appears from the following holding in *Neblett* v. *Carpenter*, 305 U. S. 297, 302:—

> "It is said that the Code does not authorize the Commissioner to delegate to a corporation organized by him powers and duties in aid of his administration of the assets of an insolvent insurance company. The state court has held such procedure is in accordance with the Code provisions.
>
> • • • • • • •
>
> All of these holdings concern matters of state law and amount at most to alleged erroneous constructions of the State's statutes by its own court of last resort. Such decisions would not be a denial of the due process guaranteed by the Fourteenth Amendment. We are, therefore, without jurisdiction to review the state court's decision of any of those questions.
>
> It is argued that the Code unconstitutionally delegates legislative functions to the Commissioner, and that the Supreme Court erred in not so holding. This, again, is a question of state law the decision of which by the State's highest court is binding upon us."

We quote as follows to the same effect from *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District*, 281 U. S. 74, 79:—

> "It was insisted by the taxpayers, plaintiffs in the state court, that these statutory provisions involved an unconstitutional delegation of legislative power to the probate court and to the nonelective park commissioners. We do not consider it necessary to consider at length this objection, or the other points sought to be made against the statute under the Fourteenth Amendment, as, in view of the repeated decisions of this Court, we do not find any substantial Federal question presented."

In *Soliah* v. *Heskin*, 222 U. S. 522, the Court recognizes in the following language that the Fourteenth Amendment does not restrict the action of the State in establishing and

determining the method of selection of those in whom shall be vested the powers exercised under its authority in a particular locality (p. 524):—

> "The Fourteenth Amendment does not deprive a State of the power to determine what duties may be performed by local officers, nor whether they shall be appointed, or elected by the people."

In view of the specific language just quoted, the contention that a Federal question arises under the Fourteenth Amendment, upon the holding of the Supreme Court of Louisiana that the contract provision for the vesting of power and authority in the Committee is fully authorized by the governing constitutional amendment, is clearly so unsubstantial as to be frivolous.

Appellants for jurisdictional purposes also rely upon *Myles Salt Company* v. *Board of Commissioners*, 239 U. S. 478, wherein the United States Supreme Court took jurisdiction of an appeal in a suit which did not attack the law of the State as written, but attacked that law as administered, and justified by the Supreme Court of the State. No such case is presented here. The instant decision of the Supreme Court of Louisiana simply holds that the contract as made by the municipality is within the scope of the authority conferred upon the municipality by the constitutional amendment embodied in Act 385 of 1938. That a question as to the extent of the contractual power of a municipality under its governing law is purely a question of State law, has been expressly recognized in the following language in *Opelika* v. *Opelika Sewer Co.*, 265 U. S. 215, 217:

> "There can be no question that the instrument purported to be a contract and that if it was a valid one it bound the Sewer Company not to charge more than the prescribed rates. *Columbus Ry., Power & Light Co., v. Columbus*, 249 U. S. 399. Whether it was valid

under the laws of Alabama belongs to the Supreme Court of the State to decide."

What this suit really attacks is the policy of the State in adopting the constitutional amendment (Act 385 of 1938), authorizing these works of great public improvement, and the policy of the municipality in entering into the contract with the railroads which the State Supreme Court has held authorized by the constitutional amendment. It is well settled that such questions of policy raise no Federal question. We quote as follows to this effect from *Endicott Johnson Corporation* v. *Encyclopedia Press*, 266 U. S. 285, 290:

> "It is further contended that this section of the Code is void because contrary to public policy. This, however, does not present a federal question."

III. Conclusion

Upon our original presentation as now supplemented, we again submit that the appeal should be dismissed, or alternatively, the judgment from which the appeal is taken should be affirmed, in either instance with an award of substantial damages against appellants for taking a dilatory appeal on frivolous and unsubstantial grounds.

September 1st, 1948.

Respectfully submitted,

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No. 259. HOTARD ET AL. *v.* NEW ORLEANS ET AL. Appeal from the Supreme Court of Louisiana. *Per Curiam:* The motion for leave to file supplemental statement opposing jurisdiction, motion to dismiss or affirm and motion for damages are granted. The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Lester P. Schoene* for appellants. *Henry B. Curtis, David M. Wood, R. E. Milling, Jr., Harry McCall, Leonard B. Levy, J. Blanc Monroe, Walter J. Suthon, Jr., Arthur A. Moreno* and *James U. Ogden* for appellees. Reported below: 213 La. 843, 35 So. 2d 752.